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Peterson v. Minidoka County School: Home Education, Free Exercise, and Parental Rights

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COMMENT

PETERSON v. *MINIDOKA COUNTY SCHOOL*: HOME EDUCATION, FREE EXERCISE, AND PARENTAL RIGHTS

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On July 8, 1997 the United States Court of Appeals, Ninth Circuit, decided *Peterson v. Minidoka County School District No. 331*.[1] The opinion, written by Circuit Judge John T. Noonan, Jr., expressed the court's view on two important issues. The first issue is the free exercise of religion as it relates to a parent's choice to home school her children. Second, the court considered Fourteenth Amendment concerns and the right to due process in employment. The goal of this comment is to examine the *Peterson* opinion for what it adds to the first issue; more precisely, to give specific attention to the *Peterson* case in light of what it adds to the growing debate on home schooling.[2]

* Candidate for Juris Doctor, Notre Dame Law School, 2000; B.A., University of Washington, 1978. I would like to thank my wife, Kressen Chaplin, and my five children, Philip, Christopher, Daniel, Sara, and Kyle for their constant love and living example of home education in action. Finally, I would like to thank my parents, Kenneth and Hazel Chaplin, for their unconditional support.

1 118 F.3d 1351 (9th Cir. 1997).

2 As a recent analyst noted,

> It will probably not come as a surprise to learn that homeschooling elicits much criticism and misunderstanding. Sometimes the critics are family members or neighbors. Large lobbying groups, such as the National School Boards Association and the National Education Association, have also made statements that suggest that homeschoolers are poorly supervised. In the summer of 1997, at the annual National Education Association convention, an anti-homeschooling resolution was adopted by the representative assembly. Resolution B-63 stated that homeschooling programs "cannot provide the student with a comprehensive education experience." Further, the resolution noted that, if homeschooling is chosen "instruction should be by persons who are licensed by the appropriate state education licensure agency."

In *Peterson*, Frank Peterson, a former principal of Paul Elementary School in Idaho, sued the Minidoka School District (District) claiming the District violated his First Amendment rights. The facts of the case were not in dispute. In January 1992, Peterson informed one of the District's assistant superintendents that he was considering home schooling for his children. At the next school board meeting, held in February 1992, Peterson's decision was discussed. Superintendent Michael Bishop and the board decided "to delay [their] actual rehiring until [they] could further investigate what [Peterson's] intentions were."[3]

After that meeting, rumors spread that Peterson was planning to home school his children. Parents and teachers began to complain, and because of these complaints the Superintendent's office inferred that Peterson's decision would result in a loss of confidence in his leadership. Superintendent Bishop met with Peterson to discuss the situation. Bishop learned that Peterson's desire to home school his children was motivated purely for the "reason to educate his kids with an aspect of God being the creator in all of the classes that [he and his wife] would teach."[4] However, Bishop was convinced that Peterson could not perform his job as principal and at the same time adequately home school his children.

In addition to the Superintendent's conviction that Peterson's decision to home school his children would result in leadership problems, Bishop also expressed two further concerns. Bishop believed, based on his experiences as a principal, that Peterson could not adequately perform his job as a principal, a job that required some evening work, and at the same time properly home school his children. Bishop also expressed reservations about the ability of Peterson's spouse to home school, unaided, eight children.

Officially, however, the Superintendent's office only pressed (at least as far as the lawsuit was concerned) the first two issues. In fact, the District strongly argued that the state's compelling interest[5] in education required effective principals—principals who would comport themselves in such a way that others would maintain confidence in their leadership. The Ninth Circuit found neither of these concerns very compelling. As for the District's concern that Peterson could not effectively perform his job as principal and still properly home school

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Isabel Lyman, *Homeschooling: Back to the Future?*, POL'Y ANALYSIS, Jan. 7, 1998, at 8 (citations omitted).

3 *Peterson*, 118 F.3d at 1354.

4 *Id.* at 1355.

5 *See infra* note 82 and accompanying text.

his children, the court noted that the District had the authority to inspect and approve any home school curriculum.

Regarding the District's complaint that Peterson's decision would reduce his effectiveness as a leader, the Ninth Circuit noted—rather acerbically—that any "concern for loss of confidence in [Peterson's] leadership, [required] the District . . . to take account of the fact that [Peterson] was exercising a constitutional right and that accommodation of uninformed and prejudiced persons was not a compelling state interest outweighing that exercise."[6]

It is interesting to note that Idaho law provides for home education as a legitimate alternative. The State's only legitimate concern is ensuring that children are "instructed in subjects commonly and usually taught in the public schools of the state of Idaho."[7] So why did the District make such a fuss about Peterson's decision to home school his children? What was it about Peterson that caused him to be singled out, especially when the law of the land permitted him to do what he wanted—home school his children?[8] Although the Ninth

6 *Peterson*, 118 F.3d at 1357.

7 IDAHO CODE § 332-02 (1995).

8 There are at least two answers to this question. Perhaps the School District simply had more leverage with Peterson than with other parents in the District. This answer seems especially plausible in light of the concerns Bishop expressed about Mrs. Peterson's ability. Nothing in Idaho law required a home-schooling parent to possess any particular degree, training, or certification. And of course many jobs, like Frank Peterson's, require parents to work evenings, yet they still manage to take an active role in the home education of their children. The other potential answer is that home schooling is not able to meet a children's academic or social needs. Critics are quick to note that home schooling does not provide the type of social interaction available to children in private or public school. The implication being that the kind of socialization children receive in a more formal setting is somehow better than what they receive at home. In addition, home school opponents challenge the level of academic achievement of home schooled children. However, while there are undoubtedly anecdotal instances that bolster this belief, the facts tell a different story. As one commentator observed,

> Several state departments of education have also done studies on the academic progress of home schooled children. In the spring of 1986, the Tennessee Department of Education found that home schooled children in 3rd grade scored in the 90th percentile in reading on the standardized test and that public school students scored in the 78th percentile. In math, the home schooled children scored, on average, in the 86.8th percentile, while their public school counterparts scored in the 80th percentile.
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> Similarly, the State Department of Education in Alaska has surveyed home schooled children's test results every other year since 1981, and has found home schooled children to be scoring approximately 16 percentile points higher, on the average, than the children of the same grades in conventional schools.

Circuit did not spend much time speculating about this seeming incongruity, the court noted that if the District was concerned with Peterson's ability to do his job, "the District had the power conferred by Idaho law to inspect and approve the proposed home instruction curriculum . . . ."[9] Instead of this course of action, however, the District decided on May 6, 1992 to reassign Peterson to an elementary school teaching position. On August 31, 1992, the Petersons filed suit.

The Ninth Circuit viewed Peterson's decision to home school his children as one protected by the free exercise of religion. Specifically, the court held that "as to the exercise of religion by parents in their choice of schooling for their children, the right is established by *Wisconsin v. Yoder*."[10] However, the court also observed that the religious right to home school is not unlimited. "The state's own high interest in education limits it."[11]

Limitations aside, however, *Peterson* stands for the proposition that home school free exercise claims are judicially defensible. Accordingly, this Comment uses the *Peterson* case as a springboard to more fully examine five topics: (1) the historical background of home schooling in the United States; (2) free exercise claims for home schooling, and what the *Peterson* case adds to the discussion; (3) the meaning of the state's high interest in education; (4) the compelling interest test and whether it is still viable; and (5) a brief assessment of the expected future impact of the *Peterson* decision on free exercise causes of action as they relate to home education.

I. HISTORICAL BACKGROUND

Even though home education is often thought of as a current affair, its roots stretch back to, and before, the colonial days of

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. . . Several studies have been done to measure home schoolers' "self-concept" which is the key indicator for establishing a child's self-esteem. A child's degree of self-esteem, of course, is the best objective measurement of his ability to interact successfully on a social level. One such study was conducted using the Piers-Harris Children's Self-Concept Scale to evaluate 224 home schooled children. The study found that one-half of the children scored above the 90th percentile and only 10.3% scored below the national average.

J. Michael Smith & Christopher J. Klicka, *Review of Ohio Law Regarding Home School*, 14 OHIO N.U. L. REV. 301, 303-04 (1987) (footnotes omitted).

9 *Peterson*, 118 F.3d at 1357.

10 *Id.* at 1356 (citation omitted).

11 *Id.* at 1358.

America.[12] "For example, the English Poor Laws of the sixteenth and seventeenth centuries were designed to teach poor children a trade to help make them productive citizens . . . ."[13] Accordingly, as one commentator put it, "[h]istorically, the education of children in the United States was a matter of parental discretion. Decisions to educate or not to educate, and the substance of that education—method and curriculum—were made by the parents as a right."[14]

Originally, education was not a government responsibility; the duty to educate children fell primarily on the parent, and parents took that duty seriously. As supporters of home education are quick to point out, some of this country's most revered citizens were either partly or completely products of home schooling. "Presidents Woodrow Wilson, Franklin Roosevelt, and George Washington studied at home. . . . John Quincy Adams went directly from home to Harvard; and Frank Vandiver, a distinguished Civil War historian and until recently president of Texas A&M University, studied at home."[15]

Yet as the years passed and American government grew, the burden of educating our young fell increasingly to the state. The reasons for this shift from an educational paradigm based on parental control to one of state responsibility are beyond the scope of this Comment; however, a natural outcome of the shift was an increase in laws designed to regulate education. One of the earliest education laws enacted was the "Massachusetts School Law of 1647, commonly referred to as the 'Ye Old Deluder Satan' statute. This law required the establishment of schools to teach writing, reading, and Bible study as the means of preventing Satan from succeeding in the battle for the souls of women, men, and children."[16] Soon thereafter, nearly every colony passed a statute similar to Massachusetts's.[17] While these statutes were primarily religious in motivation, they set the stage for increasing governmental oversight of education.

Then, in 1852, again in Massachusetts, the first modern education statute was enacted.[18] This statute had as its aim "to teach chil-

12 *See* Kara T. Burgess, Comment, *The Constitutionality of Home Education Statutes*, 55 UMKC L. REV. 69, 69-70 (1986).

13 Donald D. Dorman, Note, *Michigan's Teacher Certification Requirement as Applied to Religiously Motivated Home Schools*, 23 U. MICH. J.L. REFORM 733, 734 (1990).

14 James W. Tobak & Perry A. Zirkel, *Home Instruction: An Analysis of the Statutes and Case Law*, 8 U. DAYTON L. REV. 1, 13-14 (1982) (footnote omitted).

15 Michael S. Shepherd, *Home Schooling: Dimensions of Controversy, 1970-1984*, 31 J. CHURCH & ST. 101, 102–03 (1989).

16 WILLIAM M. GORDON ET AL., THE LAW OF HOME SCHOOLING 6 (1994).

17 *See id.* at 6–7.

18 *See id.* at 7.

dren to read, write, and compute . . . ; to eliminate truancy; and, to obviate abuses in child labor. . . . Accordingly, it was social, not religious, reform that precipitated a shift in the law, moving the education of children from home to the public schools."[19] By 1900 nearly every state in the union had some sort of obligatory attendance law.[20] "Today every state has some form of compulsory attendance statute."[21]

Ironically, as government control of the educational system grew, so too did citizen dissatisfaction with that system.[22] Early revolts came from parents wanting to move their children from public schools to private schools. At first, parents faced strong opposition to this decision.[23] Eventually though, the federal judiciary recognized a legitimate right on the part of parents to choose which system would control the education of their children. One example is the landmark decision in *Pierce v. Society of Sisters*[24] which held unconstitutional an Oregon law requiring attendance at a public school.

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[25]

While parental control in education was initially limited to a choice between public versus private schooling, more was soon to come. With the growth of the home-schooling movement in the late

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19 *Id.* at 7.

20 *See* Tobak & Zirkel, *supra* note 14, at 14.

21 *Id.*

22 A case in point is the experience of John T. Gatto:

> For example, John Taylor Gatto, recent New York Teacher of the year quit after twenty-six years of teaching, because the public schools were a dismal failure. In an interview, Mr. Gatto said he quit because he didn't want to "hurt" kids anymore. He also said "government schooling . . . kills the family by monopolizing the best times of childhood and by teaching disrespect for home and parents."

CHRISTOPHER J. KLICKA, THE RIGHT TO HOME SCHOOL: A GUIDE TO THE LAW ON PARENTS' RIGHTS IN EDUCATION 3 (1998); *see also* M. David Gelfand, *Assessing the Challenges to Public Education in the 1980s*, 14 URB. LAW. xi (1982) (stating that parents are often dissatisfied with public education because of its cost, the role of teachers, and the type of curriculum used).

23 *See* KLICKA, *supra* note 22, at 10.

24 268 U.S. 510 (1925).

25 *Id.* at 535.

1960s and early 1970s, parents began to push for more choice.[26] The foundation for the modern home school movement was laid nearly thirty years ago by two pioneers: Raymond Moore and John Holt.

In 1968, Moore challenged a proposal by the state of California to lower the age at which children enter school. Moore researched a series of studies conducted by professors and doctoral students around the world. His conclusion laid the foundation for the modern home-schooling movement. Not only did his research challenge the need to lower the age of children entering school, but his study reflected the fact that children learn more in a few hours of one on one tutoring than they can in a whole day of education in a group setting. Moore used this research to reach out to local communities around America to encourage parents to consider home schooling.

Contemporaneous to Moore's work, John Holt, a professional educator, challenged public education because of its lack of humanity. Specifically, Holt criticized schools as "sterile, artificial, and divorced from real life experiences."[27] Eventually, Holt concluded that the most humane way to educate a child was through home schooling.

Parents chose, and continue to choose, to home school their children for a variety of reasons. Some of the more typical reasons are concerns regarding academic standards, violence in the classroom, and a clash between private and public values. However, as important as these issues are to many parents, the primary motivation behind the growing home school movement[28] is a deep religious conviction.[29] "A number of Mormons, Seventh-Day Adventists, and Amish traditionally have opted for home schooling. The more recent movement has been among Fundamentalist and Evangelical Protestants."[30] In fact, a recent study "of over 2000 home school families found that 93.8 percent of the fathers and 96.4 percent of the mothers describe themselves as 'born-again' Christians."[31] These parents believe that God

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26 *See generally* GORDON ET AL., *supra* note 16, at 1–4.

27 Eugene C. Bjorklun, *Home Schooled Students: Access to Public School Extracurricular Activities*, 109 W. EDUC. L. REP. 1, 2 (1996).

28 "Researchers have estimated the number of American children in home schools to be as high as one million." James G. Dwyer, *The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws as Denials of Equal Protection to Children of Religious Objectors*, 74 N.C. L. REV. 1321, 1350 n.112 (1996).

29 *See* GORDON ET AL., *supra* note 16, at 2–3.

30 John S. Baker, Jr., *Parent-Centered Education*, 3 NOTRE DAME J.L. ETHICS & PUB. POL'Y 535, 549 (1988).

31 KLICKA, *supra* note 22, at 49 n.1. The following example, excerpted from the *Wall Street Journal*, typifies this religious motivation:

> The judgment of God—final, forever—is the first lesson in this classroom today.

has given them both the responsibility and authority to educate their children.[32]

II. PETERSON, FREE EXERCISE CLAIMS, AND HOME SCHOOLING

The pivotal case accepting a First Amendment, freedom of religion justification for home schooling was *Wisconsin v Yoder*.[33] The Yoders, an Amish family, rejected state sponsored education beyond the eighth grade because they "believed, in accordance with the tenets of Old Order Amish communities generally, that their children's attendance at high school, public or private, was contrary to the Amish Religion and way of life."[34] Instead of participation in public education, the Amish proposed bringing their children home to educate and train them vocationally. The Court agreed, and granted an Amish exception to Wisconsin's mandatory school attendance statute for at least two reasons.[35]

While the order of the reasons is not dispositive, the court placed considerable weight on a combination of the following factors. First, "the Amish in this case have convincingly demonstrated the sincerity of their religious beliefs . . . ."[36] Here, the Court was concerned with separating religious from purely philosophical beliefs. Accordingly,

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> "And whosoever was not found written in the book of life was cast into the lake of fire," reads Cheryl Freidline from the Book of Revelation. Then, softly, she asks "Does God want anyone to go into the lake of fire?"
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> "No," replies Amelia Freidline, an eight-year old with a voice that is innocence itself.
>
> "What does God want them to do?"
>
> "Repent."
>
> The two, mother and daughter, are sitting on the second floor of the Freidlines' brick cape colonial home here in the western suburbs of Kansas City, [Missouri]. Cheryl and her husband, Blaine, evangelical Christians . . . , have chosen to home-school Amelia. In an extra bedroom they have replicated the look and feel of a classroom . . . .
>
> Yet the room has features you would never encounter in a public school. They are clues to a different way of seeing the world, to a different perspective on eternity. They are outward signs that the Freidlines are part of what has been called a "parallel culture" . . . .
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> . . . .
>
> The parallel culture is ultimately a culture of faith.

Dennis Farney, *Culture of Faith: For Kansas' Freidlines, Life, Politics, Religion Are Mostly Inseparable*, WALL ST. J., Jan. 30, 1996, at A1.

32 *See* KLICKA, *supra* note 22, at 49.

33 406 U.S. 205 (1972).

34 *Id.* at 209.

35 *See id.* at 235.

36 *Id.*

the *Yoder* Court took great pains to point out the religious history and culture of the Amish people.[37] Second, the Amish demonstrated "the adequacy of their alternative mode of continuing informal vocational education . . . ."[38] In other words, the Amish had developed a home-schooling system designed to train their children to more easily adapt to the rigors of Amish life.

The *Yoder* Court also noted that the entire Amish community, and not just the Yoder family, rejected public education.[39] There is some reason to think that this community rejection formed a third factor.[40] However, the degree to which the factor is independently important—especially from the first factor—is not entirely clear. In other words, is the proof of an individual's sincere religious objection found in the fact that his objection is supported by official church dogma? Or, is it that a sincere religious objection requires two things—the individual must sincerely object, and the church must object? It seems more likely, however, that the *Yoder* Court viewed the sincerity factor within the framework of the Amish community; that is, the Yoder family had a sincerely held religious belief, and the proof of this sincerity lay in the fact that the entire Amish community believed the same way.

It was this "third" requirement, however, that formed the prevailing religious justification argument for home schooling from the time of *Yoder* to the time of *Peterson.* The accepted legal thinking has generally held that withdrawal of one's children from public schools on the ground that it violates a family's religious beliefs is unacceptable unless the family's church rejects public education. Illustrative of this principle is *State v. Kasuboski,*[41] *Duro v. District Attorney,*[42] and *Burrow v. State.*[43]

In *Kasuboski,* Charles and Mary Ann Kasuboski were convicted of violating Wisconsin law requiring parents to send their children to public or private school. "The Kasuboskis, who are members and ministers of the Life Science Church (church), claimed to have withdrawn their children from the Omro public school system for religious reasons."[44] However, at trial, several witnesses testified that nothing in the Life Science Church doctrine forbade attendance at public

37 *See id.* at 209–10.
38 *Id.* at 235.
39 *See id.* at 210–11.
40 *See generally id.* at 235–36.
41 275 N.W.2d 101 (Wis. Ct. App. 1978).
42 712 F.2d 96 (4th Cir. 1983).
43 669 S.W.2d 441 (Ark. 1984).
44 *Kasuboski,* 275 N.W.2d at 102–03.

school.[45] In fact, it was pointed out that several members sent their children to public school and that no member was shunned or scorned for this decision.[46]

After recognizing the importance of compulsory education, the *Kasuboski* court went on to state that this type of regulation "can be avoided in this case only by a showing that the Kasuboskis' claims are rooted in religious beliefs. No such showing appears in the record. Neither the Basic Bible Church nor its subsidiary, the Life Science Church, has a tenet against education."[47] In other words, the *Kasuboski* court rejected the sincerity of the Kasuboskis' religious conviction because their educational beliefs were individual and not corporate. While the *Kasuboski* court spent more time than the *Yoder* Court in examining the need for corporate support to prove sincerity of religious beliefs, not much additional ground was covered. In the end, the Kasuboski court rejected Kasuboskis' claim because their belief was not religious. And the reason that their belief was not religious was that nothing in their church's doctrine or teachings supported the Kasuboskis' objections.

An additional example of this legal principle is found in *Duro v. District Attorney*.[48] The Duros, members of the Pentecostal Church, refused to comply with North Carolina's compulsory school attendance law. "According to [the Duros], exposing [their] children to others who do not share [their] religious beliefs would corrupt them."[49] While the Fourth Circuit had no doubt that the Duros were motivated by a sincere religious belief, the court nevertheless refused to extend the Amish exception to Pentacostalists. The court noted that

> "[t]his religion does not require that children be taught at home; in fact, the majority of children whose parents are members of the Pentecostal church . . . are enrolled in a public school. Notwithstanding this, [the Duros] refuse[] to enroll [their] children in a public school or the only available nonpublic school . . . ."[50]

The *Duro* court—like the *Kasuboski* court before it—distinguished *Yoder* largely on the grounds that the Amish community had rejected public education beyond the eighth grade, whereas Duro's religious convictions were peculiar to them. Put another way, "[d]espite Duro's sincere religious belief"[51] the court refused to ex-

45 *See id.* at 103.
46 *See id.*
47 *Id.* at 105.
48 712 F.2d 96 (4th Cir. 1983).
49 *Id.* at 97.
50 *Id.*
51 *Id.* at 99.

tend the Amish exception. The court justified its refusal by stating that the Duros had failed to demonstrate "that home instruction will prepare [their] children to be self-sufficient participants in our modern society or enable them to participate intelligently in our political system, which, as the Supreme Court stated, is a compelling interest of the state."[52]

It is interesting to note that the *Duro* court did not provide any examples of Duro's failure to meet the rather nebulous goals of self-sufficiency and intelligent participation in our political system. The *Duro* court recognized that its concern with the future well-being of the Duro children was a departure from *Yoder*.[53] Yet, the court believed that the case before it was factually distinguishable from *Yoder* on the ground that Yoder's children were older and had already received eight grades of public education.[54] Unfortunately, the court never addressed the issue of how many years of public education children must have before they are adequately prepared for the world in which they live.

Whereas the *Kasuboski* court measured sincerity based on conformity to church doctrine, the *Duro* court recognized sincerity despite church teaching. Accordingly, the *Duro* court leaned more toward the position that a valid free-exercise home schooling claim required two things—a sincerely held religious objection and a concurring church objection.

A final example is *Burrow v. State*.[55] In this case, Wayne Burrow was charged with violating Arkansas law for refusing to send his minor child to school. As the *Burrow* court pointed out, Arkansas law required every parent "in custody or charge [of] any child or children between the ages of seven . . . and fifteen . . . (both inclusive) shall send such child or children to a public, private, or parochial school."[56] Instead, Burrow wanted to educate his child at home.[57]

Burrow challenged the constitutionality of the Arkansas law as a violation of his First Amendment right to freely exercise the practice of his religion.[58] The *Burrow* court, while recognizing the sincerity of Burrow's religious beliefs,[59] nevertheless rejected his claim. In ruling on his appeal, the court noted two things. First, Burrow made "no

52 *Id.*
53 *See id.* at 100 (Sprouse, J., concurring).
54 *See id.* at 98-99.
55 669 S.W.2d 441 (Ark. 1984).
56 *Id.* at 442 (quoting ARK. CODE ANN. § 80-1502 (repealed 1980)).
57 *See id.*
58 *See id.* at 443.
59 *See id.* at 443–44.

showing of a religious or cultural tradition comparable to that in *Yoder*."[60] And, second, even though Burrow's beliefs were sincere, there was no evidence that forbidding Burrow from home schooling his child would result in any serious harm "to the practices of a distinct group."[61] The *Burrow* court did not clarify whether this last statement meant that Burrow needed the support of a formal religious body. However, the fact that this court bifurcated Burrow's sincere belief from the practices of a distinct religious body is telling. It is obvious that, at a minimum, the court was arguing that Burrow's beliefs (which were undoubtedly sincere[62]) by themselves were not sufficient to warrant First Amendment protection.

Whether *Yoder*, *Kasuboski*, *Duro*, and *Burrow* reflect any single trend of free-exercise jurisprudence is not entirely clear. It appears that these four decisions stand for the proposition that an individual's sincerely held religious belief must, in some measure, be tied to official church teaching. But the exact nature of this link is not consistently applied. Neither is the rationale for this requirement fully developed. At times an individual's sincerely held religious belief is proven by church support. At other times it seems more like a complete division—both the individual and her church must object.

If the latter position accurately reflects judicial thinking, it raises definite concerns about conflicts with many of the holdings of our nation's highest court.[63] However, the lack of consistency in First Amendment freedom of religion theory proves more than this comment can explore. It is sufficient to note that there are a variety of religious freedom theories, and, as observed in the cases recently reviewed, the result is not always clear. Nevertheless, the point for this discussion still holds—that courts, in some fashion, test an individual's sincerely held religious belief by the plumb line of official (whatever that means) church doctrine.

Erupting on the legal scene to challenge this principle was *Peterson v. Minidoka County School District No. 331*.[64] As already observed, Peterson's complaint was straightforward: the school district threatened to demote him after he announced his intention to home school his children. Peterson stated "his reason for home schooling his children: it was that in every course of study they would learn that God as the creator of all things was related to the subject at hand."[65]

60 *Id.* at 444.
61 *Id.*
62 *See id.* at 443.
63 *See infra* notes 70-71 and accompanying text.
64 118 F.3d 1351 (9th Cir. 1997).
65 *Id.* at 1356.

Given the mixed reception that personal religious arguments had received in prior home-schooling cases,[66] some might think that Peterson was taking an unwarranted risk. Fortunately for Peterson, the Ninth Circuit chose to face the First Amendment argument and resolve the relevant issue.

Peterson was a member of the Church of Jesus Christ of Latter-Day Saints.[67] As the member of a theistic religious body, Peterson was motivated to home school his children out of a deep religious conviction.[68] However, this conviction, as manifested in Peterson's choice of education, was personal to him. Unlike the claim in *Yoder*, in which an entire religious order stood opposed to public education, Peterson's claim was based on what he alone believed his faith demanded. After noting that Peterson's church was not opposed to outside education and that his claim was based on individual religious motivation, the court stated that "[t]here is nothing in the First Amendment's guarantee of the free exercise of religion that restricts the guarantee to the requirements of a church. . . . What the Constitution protects is an act 'rooted in religious belief.' It is undisputed that Peterson's act was so rooted."[69]

In one sense, this part of the *Peterson* decision was a radical break from earlier jurisprudence. Even if one takes the view that prior decisions had not required both individual and corporate elements, but merely held that the sincerity of the individual belief was measured by corporate support, the *Peterson* court was going beyond even this level of justification. The Ninth Circuit holding stands for the proposition that regardless of corporate support—or lack thereof—an individual's religious belief stands or falls on the individual's level of sincerity.

One of the most interesting features of *Peterson* is the way it easily, almost naturally, expanded *Yoder* to the case at hand. One is left wondering why it never happened before. What was it about the prior cases that made the courts cling to the belief that individuals were not entitled to a free exercise claim for home schooling apart from their religious communities? It seems strange indeed, especially in a country that exalts the individual and individual choice, that in this limited area of religious freedom our courts have required something more.

One can only speculate as to the reasons for judicial skepticism concerning an individual, as opposed to corporate, free exercise claim for home schooling. This is especially true in light of the Supreme

66 *See supra* notes 42–44 and accompanying text.

67 *See Peterson*, 118 F.3d at 1356.

68 *See id.* at 1355.

69 *Id.* at 1357 (citations omitted).

Court holdings in *Frazee v. Illinois Department of Employment Security*[70] and *Thomas v. Review Board of the Indiana Employment Security Division.*[71] In both cases, individuals were denied unemployment benefits because they left their jobs because of their religious convictions. In *Frazee*, the plaintiff was denied benefits because he refused to accept a job that required him to work on Sunday.[72] Similarly, in *Thomas*, the plaintiff was refused benefits because he would not work at a job that required him to participate in armament production.[73]

Both plaintiffs, Frazee and Thomas, claimed that they could not work because their individual religious beliefs would not allow them to do what the job required. And in both cases, the Supreme Court held that the individual beliefs do not require the support of a church doctrine, tenet, or teaching for First Amendment protection to apply.[74] Take for example the holding in *Thomas*:

> [T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.[75]

In light of the general Supreme Court teaching that individual religious beliefs, without more, are sufficient to trigger application of free exercise doctrine, one is left wondering what it was about home education that made the lower courts require more. One possible explanation is that it was nothing more than an evolutionary process of legal thought. There is little doubt that *Yoder* planted the seed for an "individual" argument. The Court repeatedly recognized the rights of parents to direct the religious education of their children. For example, the Court noted that parents have "fundamental rights and interests, such as . . . the traditional interest of parents with respect to the religious upbringing of their children."[76]

Additionally, the Court observed that "this case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. . . . This primary role of the parents in the upbringing of their children is now

70 489 U.S. 829 (1989).

71 450 U.S. 707 (1981).

72 *See Frazee*, 489 U.S. at 830.

73 *See Thomas*, 450 U.S. at 709.

74 *See Frazee*, 489 U.S. at 834–35; *Thomas* 450 U.S. at 715–16.

75 *Thomas*, 450 U.S. at 715–16.

76 Wisconsin v. Yoder, 406 U.S. 205, 214 (1972).

established beyond debate as an enduring American tradition."[77] In addition, legal scholars after *Yoder* recognized the importance of First Amendment protection for individual decisions. For example, one commentator went so far as to state, "If there is any single unifying principle underlying the two religion clauses, therefore, it is that individual choice in matters of religion should remain free: individual decisions are to be protected . . . ."[78]

Of course the previous comments cannot explain the various courts' disparate holdings when it comes to home-schooling issues. Even the *Peterson* court did not attempt to elucidate its break from historical jurisprudence. Indeed, it seems likely that the *Peterson* court would not consider its holding a break from anything. The fact that the court tied its holding to *Yoder* reflects the fact that the Ninth Circuit saw itself as squarely within sound legal doctrine. Indeed, given the holdings in *Thomas* and *Frazee*, there is every reason to believe that the *Peterson* court was doing nothing more than enunciating accepted judicial thought.

One of the comments of the *Frazee* court, however, may shed light on this muddled issue of an individual's sincerely held religious belief:

> Undoubtedly, membership in an organized religious denomination, especially one with a specific tenet forbidding members to work on Sunday, would simplify the problem of identifying sincerely held religious beliefs, but we reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization.[79]

When the *Frazee* court rejected the need to have the support of an organized religious body, it did so recognizing that identifying an individual's sincerely held religious beliefs would be much easier if the individual was responding to a specific church tenet forbidding them from participation in the particular practice in question (whether working on Sunday, building weapons, or home schooling children). This ease of recognition goes far towards explaining much of the pre-

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77 *Id.* at 232.

78 Gail Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. CHI. L. REV. 805, 810 (1978); *see also* Leslie Gielow Jacobs, *Adding Complexity to Confusion and Seeing the Light: Feminist Legal Insights and the Jurisprudence of the Religion Clauses*, 7 YALE J.L. & FEMINISM 137, 159 (1995) ("[T]he putative purpose of the religion clauses is not to set behavioral norms, but to preserve a space for individual decisions. Individual choice and volition are crucial to the value of the interest protected.") (citation omitted).

79 *Frazee*, 489 U.S. at 834.

Peterson judicial thinking. Our American courts have long been hesitant to probe the depths of theological issues.[80]

Accordingly, it appears that judges find religious issues easier to decide, and perhaps more acceptable, when there is an official proxy. In the case of sincerely held religious beliefs, a readily available proxy is the official teaching of a formal religious body. The advantages of deferring to a religious body are at least twofold. First, this deference saves judges from having to make religious decisions—decisions which many judges feel less than prepared to make. In other words, by deferring to official church teaching, a judge need not decide which individual belief is sincere and which one is not. For as the Supreme Court held in *Lynch v. Donnelly*,[81] state endorsement of religious beliefs violates the Establishment Clause.

Second, this deference serves the added benefit of making judicial decisions acceptable. Acceptable, of course, does not necessarily mean correct. However, acceptable decisions serve the function of creating an aura of fairness. By deferring to a recognized religious body in issues that are outside of standard judicial bounds, judges can hold themselves out as protectors of cherished institutions.

In the end, though, whether the change in judicial thinking over sincerely held religious beliefs reflects an evolutionary process, deference to an acceptable proxy, or a more determined resolve to wrestle with difficult issues, one thing is clear—the *Peterson* decision stands for the proposition that free exercise home-school claims deserve the same legal standards as all other free exercise claims. Along with this view comes all the traditional legal baggage. For example, the *Peterson* court clung to the view that a state may, at times, override a person's free exercise of religion.

III. The State's High Interest in Education

"Frank Peterson had the constitutional right to exercise his religion. This precious liberty, however, is not so absolute that its exercise may be enjoyed without collateral consequences if, in exceptional circumstances, that exercise impacts a compelling state interest."[82] With those few words, the Ninth Circuit affirmed that, in certain situations, the state may override a citizen's right to free exercise of religion. Of course, this statement is not a new proposition.

80 *See generally* Ehlert v. United States, 402 U.S. 99, 105 (1971); Feldstein v. Christian Science Monitor, 555 F. Supp. 974,978 (1983).

81 465 U.S. 668 (1984).

82 118 F.3d at 1357.

No constitutional right enjoys limitless protection. Even First Amendment rights are subject to certain strictures. Thus it has been held that the right to free speech is not absolute.[83] Examples of free speech restrictions include restrictions on speech that are defamatory[84] or libelous.[85] So too, religious rights are not without certain constraints. For example, we limit religious support by the state;[86] we even support punishing individuals when their religious practices conflict with other ideals (for example, holding Native Americans criminally liable for the illegal use of Peyote—even when this use is directed by their religion[87]). Courts have regularly overruled an individual's free exercise claim when the balance tips in favor of the state's interest. Just what causes the scales to tip one way or the other, though, has not always been clear.

The *Peterson* court observed, however, that parents have a constitutional right to participate in the determination of their children's education.[88] However, this right, as we have seen, is not absolute. "The state's own high interest in education limits it."[89] So for the *Peterson* court, at least, the state's compelling interest was tied to the state's interest in education. But what exactly did the court mean by its high interest in education? Was the question whether the state had

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83 *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

> [I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Id. (citations omitted).

84 *See* Lauderback v. American Broad. Cos., 741 F.2d 193, 195 (8th Cir. 1984) ("While the right of free speech provides absolute protection to statements which are purely opinions, it is conceded that statements clothed as opinion which imply that they are based on undisclosed, defamatory facts are not protected.") (citations omitted).

85 *See Chaplinsky*, 315 U.S. at 571–72.

86 *See* Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 780 (1973) ("In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid.").

87 *See* Employment Div. v. Smith, 494 U.S. 872, 878 (1990).

88 118 F.3d at 1358.

89 *Id.*

an interest in publicly educating Peterson's children, or in having effective principals? Clearly, the question on appeal was "whether the District's . . . concerns about Frank Peterson's work as principal outweighed the Petersons' constitutional right . . . . That question is resolved by . . . the [laws regarding] free exercise of religion."[90]

Yet, while the Court recognized that the compelling interest in the present case was Peterson's work, it also made clear that other issues were relevant. In quoting from *Pierce v. Society of Sisters* the court recognized that parents have the liberty "to direct the upbringing and education of children under their control."[91] In the court's concurring opinion, Judge Fletcher made the timely observation that "[w]hat the district court had to balance, then, was Peterson's right to free exercise of his religion and to control the education of his children . . . against the district's vague concerns that Peterson might no longer be an effective leader."[92]

In other words, the school district focused only on the state's interest in effective employees and did not account for Peterson's constitutionally protected interest in educating his children. The Ninth Circuit, however, realized that not only does a state have a high interest in having effective teachers, but parents have a high interest in educating their children.[93]

The issue then was one of balancing. If the state's interests (whatever they are) outweigh the individual's right to free exercise, the state wins. The reverse is also true. As for Peterson, Judge Noonan commented, "The District could only assert a compelling interest if well-informed persons understood Peterson's action as a vote of no confidence in the school system rather than as the practice of his religion."[94] Peterson, however, never expressed a lack of faith in the education system. His only concern was with integrating his religious faith with his children's education.

Accordingly, the District's criticism came down to a general concern that because Peterson wanted to home school his children, the faculty and parents would lose confidence in his credibility as a principal. Judge Noonan found this argument less than compelling. Rather, he held that the school district was incorrect "in reasoning that a religiously-motivated school principal following his conscience as to his own children would somehow be the object of scorn or dis-

90 *Id.*

91 *Id.*

92 *Id.* at 1361.

93 *See id.* at 1357–58.

94 *Id.* at 1357.

trust of his faculty or parent patrons. The district court as a matter of law rightly determined that the District's interests were not compelling."[95]

With this holding, Peterson's free exercise claim was established. Apart from noting the state's high interest in education and expressing a vague concern over defending a state's statutory scheme in education, however, the Ninth Circuit failed to leave a clear framework for understanding what might constitute "a state's compelling interest." This lack of framework, though, should not be surprising. There is no evidence that our courts have ever developed a principled definition of the "compelling interest" test—if indeed calling it a test is fair, for a test assumes some measure of verifiable objectivity. And as Sanford Levinson once observed, "[A]nyone who actually teaches constitutional law knows that few things are less clear than the operation of the compelling interest doctrine."[96] Compelling interest tests often serve a more amorphous role; they are often merely a means of justifying a judge's intuitive sense of what is fair.

IV. THE COMPELLING INTEREST TEST

The compelling interest test, as we know it, was first propounded by the Supreme Court in *Sherbert v. Verner*.[97] In *Sherbert*, the Supreme Court of South Carolina upheld the denial of unemployment benefits to Sherbert who refused to work, because of her religious beliefs, on Saturday.[98] Justice Brennan, writing for the majority, reversed this decision because it violated the claimant's free exercise rights. Brennan stated that for South Carolina's decision to withstand constitutional scrutiny "it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of [her] religion may be justified by a 'compelling state interest.'"[99]

The Court went on to hold that denial of unemployment benefits imposes an unwarranted burden on Sherbert's right to the free exercise of religion. Next, Brennan considered whether there was a compelling state interest that justified abrogating Sherbert's rights. Ultimately, the court decided there was not. However, in the process

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95 *Id.*

96 Sanford Levinson, *Identifying the Compelling State Interest: On "Due Process of Lawmaking" and the Professional Responsibility of the Public Lawyer*, 45 HASTINGS L.J. 1035, 1036 (1994).

97 374 U.S. 398 (1963).

98 *See id.* at 401.

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

of making this decision the court attempted to outline the contours of compelling interest doctrine. "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'"[100] This statement was not exactly a bright line definition. In fact, the definition seems to raise more questions than it answers. After all, what is a "highly sensitive" constitutional area? What does the court mean by "gravest abuses"? Or what is a "paramount interest"? This is the definition, however, that lower courts were left to flesh out.

In one sense, talk of a compelling interest test is rather artificial. For the Supreme Court, in *Employment Division v. Smith*,[101] supposedly invalidated the compelling interest test. The issue in *Smith* was whether Native American Indians had a constitutionally protected right to smoke peyote as part of a recognized religious ritual. The claimants in *Smith* lost their jobs as a result of their use of peyote, and because of this "misconduct," they were also denied unemployment benefits.[102] The Supreme Court of Oregon held that, while the use of peyote violated established criminal laws, this violation was invalid because it breached the claimant's free exercise rights.

The Supreme Court, Justice Scalia writing for the majority, reversed, holding that, so long as it "is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[103] The Supreme Court then turned its attention to the compelling interest doctrine. In speaking on this issue, the court held,

> If the "compelling interest" test is to be applied at all, then, it must be applied across the board, to all actions thought to be religiously commanded. Moreover, if "compelling interest" really means what it says . . . , many laws will not meet the test. Any society adopting such a system would be courting anarchy . . . . Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.[104]

100 *Id.* at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

101 Employment Div., v. Smith, 494 U.S. 872 (1990).

102 *See id.* at 874.

103 *Id.* at 878.

104 *Id.* at 888 (quoting Braunfeld v. Brown, 366 U.S. 599, 606 (1961)).

Smith then stands for the proposition that a facially neutral and generally applicable law does not require a compelling interest (or strict scrutiny) standard when free exercise claims are implicated. The legal community was quick to recognize that the holding in *Smith*, at least conceptually, did away with the compelling interest test.[105] Accordingly, not every legal scholar was happy with this result. As Douglas Laycock lamented, "The Court held that every American has the right to believe in a religion, but no right to practice it."[106] However, some are not convinced, including apparently the Ninth Circuit, that the compelling interest test was destroyed rather than merely reworked.[107] Thus, in what has come to be known as the "hybrid" approach, the compelling interest test has taken on a new life.

The so-called hybrid test is meant to describe a situation where the courts are still encouraged to use the compelling interest test. In reality, the hybrid test is more accurately viewed as an exception to the *Smith* Court's rejection of the compelling interest test. The Court (in dicta) held that it was possible to challenge a neutral and generally applicable law when the religiously motivated challenger demonstrates that the law affects "the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press . . . or the right of parents . . . to direct the education of their children."[108]

So the challenger must establish two claims. First, it must be shown that the law has a negative impact on the challenger's constitutionally protected right to the free exercise of religion. Second, it must be shown that this law also implicates an additional constitutional right. When these two points have been established, then the state must demonstrate a compelling interest.[109] It should be pointed out, however, that the *Smith* Court never mandated any exception to its rejection of the compelling interest test. Nevertheless, lower courts have regularly held that this "hybrid test" should be applied. Consider the following examples.

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105 *See* Vandiver v. Hardin County Bd. Educ., 925 F.2d 927, 932 (6th Cir. 1991) ("*Smith* sharply criticized the use of *Sherbert* balancing, finding that a compelling government interest test, while useful in evaluating government distinctions based on race or government regulations on the content of speech, is inappropriate in free exercise cases.").

106 Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 BYU L. REV. 221, 221 (1993).

107 *See* Krafchow v. Town of Woodstock, No. 96-CV-1538, 1999 WL 645687, at *14 (N.D.N.Y. Aug. 18, 1999).

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

109 *See* State v. Miller, 549 N.W.2d 235, 240 n.8 (Wis. 1996).

In *Cornerstone Bible Church v. City of Hastings,*[110] a local church sued the city claiming the city's zoning ordinance violated the church's free exercise of religion and its constitutional right to freedom of speech, freedom of association, due process, and equal protection.[111] The court recognized that the hybrid test is implicated when laws "violate the free exercise clause and some other constitutional right."[112] And further, the court found, when this combined violation occurs, the resulting cause of action "will receive strict scrutiny."[113]

In other words, when hybrid rights are violated, the state must show a compelling interest before the law can stand. In this case, however, the lower court found that the Cornerstone Bible Church had not established that hybrid rights were violated. The court rejected the church's argument that its right to free exercise of religion was violated and also held that the church failed to prove a violation of an additional constitutional right.[114]

On appeal,[115] however, the Eighth Circuit reversed on the issue of hybrid rights stating, "Our reversal of the summary judgment orders breathes life back into the Church's 'hybrid rights' claim; thus, the district court should consider this claim on remand."[116] The Eighth Circuit affirmed the lower court's summary judgment on the free exercise claim except insofar as it could be combined with another right, thus establishing a hybrid rights claim. Specifically, the court overturned summary judgment on the Church's free speech and equal protection claims, presumably leaving the door open for combining one of these with the free exercise claim.[117]

Consider also the case of *Swanson v. Guthrie Independent School District No. I-L.*[118] In this case, a home schooled child and her parents brought suit because the school district refused to allow the child to attend public school on a part-time basis. The Swanson family claimed that this refusal violated their free exercise rights and their parental right to direct the education of their child. While the *Swanson* court rejected the free exercise claim because the school board's policy was neutral, the court explicitly recognized the validity of the

110 740 F. Supp. 654 (D. Minn. 1990).

111 *See id.* at 657.

112 *Id.* at 670.

113 *Id.*

114 *See id.* at 670.

115 *See* Cornerstone Bible Church v. City of Hastings, 948 F.2d 464 (8th Cir. 1991).

116 *Id.* at 473.

117 *See id.*

118 135 F.3d 694 (10th Cir. 1998).

hybrid rights test, but also noted that "[i]t is difficult to delineate the exact contours of the hybrid-rights theory discussed in *Smith*."[119]

In attempting to describe the limits of the hybrid rights test, the court stated that "[a]t a minimum . . . it cannot be true that a plaintiff can simply invoke the parental rights doctrine, combine it with a claimed free-exercise right, and thereby force the government to demonstrate the presence of a compelling state interest."[120] The *Swanson* court recognized parents' rights to direct the education of their children as a valid constitutional right; however, this right did not extend as far as the Swanson family would have liked.[121]

While parents have the right to send their children to private, public, or home schools, *Swanson* tells us that they do not have an absolute right to do so however they please. While the parental right to direct the education of children is a constitutionally-protected right, this right has certain boundaries. And, when the boundaries of this right are crossed, that right cannot be used in combination with a free exercise claim for the purpose of invoking a hybrid-rights analysis.

A final example is *Vandiver v. Hardin County Board of Education*.[122] This case grew out of a high school student's (Brian Vandiver's) claim that because the defendant required him to pass equivalency examinations in order to receive credit for his religious home study program, his free exercise rights and his right to due process and equal protection were violated. The court first analyzed Kentucky's law and determined that the "regulation of public school testing and academic standing is a valid and neutral law of general applicability within the meaning of *Smith*, so that a free exercise challenge is presumably precluded."[123]

However, the court also noted that "*Smith* does recognize a special place in [F]irst [A]mendment jurisprudence for those 'hybrid' statutes which affect not only religiously motivated actions but also

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119 *Id.* at 699.

120 *Id.* at 700.

121 *See id.* at 702.

122 925 F.2d 927 (6th Cir. 1991); *see also* Black v. Snyder, 471 N.W.2d 715 (Minn. Ct. App. 1991) (holding that the requirement of a compelling interest test for facially neutral laws is limited to circumstances where the law directly conflicts with religious conduct or belief and to cases where hybrid-rights are implicated); South Jersey Catholic Sch. Teachers Org. v. St. Teresa of the Infant Jesus Church Elementary Sch., 696 A.2d 709 (N.J. 1997) (holding that the hybrid-rights test is valid when challenging a facially neutral law); State v. Miller, 549 N.W.2d 235 (Wis. 1996) (recognizing the potential application of the hybrid-rights test).

123 *Vandiver*, 925 F.2d at 932.

burden other constitutionally protected rights."[124] In this case, however, the court did not find it necessary to do a hybrid analysis because nothing in "Kentucky's statute or any action of the defendants interfered with Brian's right to pursue a religious education in the home."[125] The court explained that "Brian's alleged interest is in minimizing the burdens of test-taking, not in religious education. . . . [N]o special constitutional protections have been recognized for those who feel burdened by testing."[126]

The hybrid-rights test raises many interesting questions, not the least of which is why does the court require an add-on right with religious rights in order to get a compelling interest analysis? Or, is it that a free exercise right no longer exists when faced with a neutral, generally acceptable law? If so, one must question the wisdom of hybrid-rights analysis. If there is no valid free exercise right, then the legal analysis would be more straight forward (and honest) to simply focus on the "other" right and ignore the free exercise right altogether.

This observation is not without academic support in recent scholarship. Consider the following opinion in a recent student note examining the impact of hybrid rights analyses in the lower courts: "Analysis of hybrid claims in the lower courts leads to the unmistakable conclusion that the hybrid 'calculus'. . . simply is not being applied. Instead, these cases are being decided based solely upon the strength or weakness of the 'other' constitutional provision without reference to the Free Exercise Clause."[127] Justice Souter came to a similar conclusion when he observed, regarding a hybrid-rights claim, that if this "claim is one in which the 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."[128]

While a critique of the *Smith* decision is beyond the scope of this Note,[129] a brief observation seems appropriate. If the goal of the

124 *Id.* at 932–33.

125 *Id.* at 933.

126 *Id.*

127 William L. Esser, IV, Note, *Religious Hybrids in the Lower Courts: Free Exercise Plus or Constitutional Smoke Screen?*, 74 NOTRE DAME L. REV. 211, 242. (1998).

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

129 For a critique of *Smith*, see Kenneth Marin, Note, Employment Division v. Smith: *The Supreme Court Alters the State of Free Exercise Doctrine*, 40 AM. U. L. REV. 1431 (1991), and Rashelle Perry, Note, Employment Division, Department of Human Re-

Smith court was to eliminate the compelling interest test because of perceptions that the test could be, and probably was, applied in an unprincipled fashion, then similarly-minded lower court judges can use the *Smith* holding to do just that. However, since the *Smith* court left the door open for strict scrutiny based on a hybrid analysis, some judges may be motivated to find hybrid-rights in order to invoke a compelling interest analysis. In the end, one is left wondering whether the *Smith* decision clarified or further confused free exercise analysis.

Further, if the criticisms of Justice Souter and commentator William Esser are correct, then two questions remain unanswered. First, why do courts still employ a hybrid-rights test? And second, what about *Peterson*? To answer the first question, one need only reflect on the opinion that hybrid-rights analyses are often performed because of strong emotional opinions regarding religious rights in general. Whether one either supports or opposes religious rights, the fact remains that our American psyche has been conditioned to accept that religious rights are somehow different from, and some may even argue superior to, other rights. As a testimony to this high regard of religious rights, consider what the *Yoder* court had to say about the protection of religious rights compared to philosophical beliefs.

> A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations . . . . Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time . . . , their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.[130]

For whatever reason, religious values are treated differently.

The second question brings us to the heart of this Comment. The *Peterson* court recognized the undeniable existence of a valid free exercise right for Peterson to direct the religious training of his children. While it is true that the Ninth Circuit did employ a compelling interest test (and failed to refer to either the *Smith* decision or to hybrid-rights), the court did, nevertheless, employ a hybrid-rights analysis.

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sources v. Smith: *A Hallucinogenic Treatment of the Free Exercise Clause*, 17 J. CONTEMP. L. 359 (1991).

130 Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972).

To prove this last point, one only has to consider the significant amount of space the court devoted to Peterson's free exercise rights and to his parental rights. The concurring opinion summed up this analysis when it noted that the district court had to balance "Peterson's right to free exercise of his religion and to control the education of his children" against the school district's need for effective leaders.[131] Thus, the *Peterson* court performed a compelling interest analysis because it, implicitly, felt constrained by Peterson's hybrid rights of the free exercise of his religion and his constitutionally protected parental right to direct the education of his children. Consequently, the *Peterson* court validated the hybrid-rights exception propounded by the *Smith* court.

Of course, such a conclusion does not, necessarily, invalidate the criticisms of either Justice Souter or Mr. Esser. It would appear that both of them are concerned with what some perceive as the declining importance of free exercise rights. However, *Peterson* is, potentially, a model for strengthening those very rights. Rather than deny the validity of a claimant's free exercise right, as was done in *Cornerstone Bible Church*, *Peterson* demonstrates that a court can embrace a healthy free exercise claim, combine it with another claim, and preserve the cause of action.

Admittedly, this approach is not the same as recognizing a stand alone free exercise right. And ultimately, it may be for the legislature to devise a permanent solution to the *Smith* problem. However, hybrid-rights may be the best our current jurisprudence can muster.

Recently, Professor Ira Lupu observed—rather sardonically—that hybrid-rights are

> claims . . . based upon the conjunction of free exercise and other constitutionally significant rights, like free speech or parental control over the rearing of children. . . . [A] great many free exercise claims might be recast to take advantage of this construct. . . . [F]ree exercise claims frequently involve expression, association, or parental concern for the religious upbringing of their children. The last of these, of course, is the most important; it is the foundation of *Wisconsin v. Yoder*, and because it depends upon the judge-made right of parental control as a boost to the textual right of free exercise, it is the most controversial member of the hybrid rights set. . . . Creative lawyering might thus preserve the force of many potential claims. At the very least, pressing hybrid claims wherever plausible will presumably result in either an explanation and reaffirmation of "free exercise plus," or an ultimate admission by the

131 *Peterson*, 118 F.3d at 1361 (Fletcher, J., concurring).

> Court that the theory was no more than an unprincipled attempt to pretend that *Yoder* survived *Smith*.[132]

Following Lupu's reasoning, *Peterson* (and other cases like it) may turn out to be nothing more than the proverbial "last straw" forcing the Court to enunciate a more principled free exercise analysis. On the other hand, *Peterson* may be an answer to the criticism of Mr. Esser and Justice Souter. It is quite likely that *Peterson* provides a model for courts sympathetic to upholding free exercise claims.

V. CONCLUSION: PETERSON AND THE FUTURE

This Comment attempts to do three things. First, it gives the reader a brief historical overview of the home school movement. Second, it provides an introduction to home school free exercise claims and to the contributions of the *Peterson* court. Third, it examines the compelling interest test and how this test has changed since *Smith* was decided. The final question to be addressed is, "What does the *Peterson* decision mean for future home school free exercise claims?" At a minimum it means that parents' rights to direct their children's education will continue to be recognized as constitutionally protected. More importantly, this case reinforces the established trend that free exercise claims, including home school claims, begin with an individual's sincerely held religious belief; the sincerity (or lack thereof) is measured by the individual's belief, regardless of corporate support.

That *Peterson* stands for the proposition that religious rights are to be measured by the individual's faith alone has already received recognition in the academic community. Professor Rosemary Salomone stated that *Peterson* stands for the fact that the "First Amendment's guarantee of free exercise of religion protects acts rooted in religious beliefs as perceived by the 'believers' and is not limited to requirements mandated by a church."[133]

Whether *Peterson* will have any effect on the rights of parents to opt-in to public education is yet to be determined. That parents even want this choice may surprise some. Since many parents have removed their children from public school over religious issues, it is understandable that school officials may be confused over the move by some parents to bring their children back. However, some parents want their children to have access to the public school system. Yet,

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132 Ira C. Lupu, Employment Division v. Smith *and the Decline of Supreme Court-Centrism*, 1993 BYU L. REV. 259, 266–67 (1993).

133 Rosemary C. Salomone, *Struggling With the Devil: A Case Study of Values in Conflict*, 32 GA. L. REV. 633, 677 n.203 (1998).

these same parents are not interested in turning over the reigns of control.

Parents want, and like, the freedom of home school and the benefits of public school.[134] However, as observed in the *Swanson* case, schools are not always open to this idea. Whether the ultimate solution to this problem will come through the courts or by way of the legislature is not certain. Yet, if a judicial exception is inevitable, *Peterson* provides a working model for a solution to this dilemma.

The outer limits of the *Peterson* decision are yet to be seen. In the end, the *Peterson* case may prove to be just one more attempt to wrestle with what many consider a rather disingenuous *Smith* court analysis. It is encouraging, however, that *Peterson*—while admittedly a *Smith* hybrid analysis—nevertheless performed that analysis "pro" free exercise. Until either the Court or Congress can come up with a better way to support free exercise rights, *Peterson* provides home school advocates with some hope of continuing freedom.

134 *See* Ralph D. Mawdsley, *Parental Rights and Home Schooling: Current Home School Litigation*, 135 W. EDUC. L. REP. 313, 322 (1999).