

# The Constitutional Basis for Home Education

by John Holt

1. The US. Constitution, under the First, Ninth, and Fourteenth Amendments, protects the rights of parents to get for their children the kind of education they want.
2. The Supreme Court, in *Pierce v. Society of Sisters* (1925) and *Farmington v. Tokushige* (1927), in upholding this right, said that the states could not, either through laws or regulations, impose a uniform system of education on all children.
3. Where the Supreme Court has upheld that the states have the legal power, under the Constitution, to regulate the education of children, it has done so on this ground alone, that the people have a right to protect themselves against the danger that uneducated children might grow up so ignorant as to be unemployable and a burden to the state.
4. The states have no Constitutional mandate to spread good ideas or stamp out bad ones, or to provide children with some kind of social life, or to carry out any other purposes except the very limited one stated in #3 above.
5. The Constitutional right of parents to control the education of children is much broader than the Constitutionally permissible power of the states to control that education.
6. The states have the legal power to assure themselves that home schooling parents are indeed doing something to educate their children, and that what the parents are doing is not manifestly harmful. They will in fact be far more able to do this if they cooperate with and support home schooling families, rather than oppose them.
7. Since any laws making home schooling difficult or impossible will be un-Constitutional and will be struck down by the courts, the legislature would do well not to pass such laws. It might even be helpful to make clear, by resolution or by amendment to the existing education statutes, that the intent of the compulsory education laws is not to empower the state or the several school districts to impose a uniform system of education on all parents.

## Statement

The educational alternative I wish to present here is what I will call home schooling or home-based education, in which parents, instead of having their school-aged children in formal schools during school hours, teach them at home and in the world around the home, using the school as a resource only if and when they wish to.

Please understand first of all that is not a new idea. The new idea is that children (or people of any age) can only learn in special learning places where nothing but learning happens. Even a century and a half ago, many American children rarely if ever attended a formal school, and learned most of what they knew outside schools. At the turn of the century only six percent of our population even finished high

school. And even in this century there have been many Americans, often successful and distinguished who as children were rarely in a school setting. What we are talking about here is not a new idea but a rebirth of an old one.

The Constitution itself is, of course, altogether silent on the matter of education. When it was written, most people did in fact educate their own children, with little outside help or interference. The framers of the Constitution would have found it hard to imagine either our present rigid and punitive compulsory education laws or our enormous centrally directed educational establishment. They said nothing about education in the Constitution because they assumed that free American citizens could be trusted to go on educating their children as, with few exceptions, they had in the past.

But later on one group of Americans, for the most part native-born, wealthy, and politically powerful, began to fear that there were more and more people in the country, notably immigrants, who for one reason or another could not be trusted to educate their own children. It was because of this fear that they created our present institutions of compulsory schooling.

Because the Constitution is silent about the right of parents to educate their children does not mean that they felt they had no such right. We consider many rights to be Constitutionally protected that are not specifically mentioned, among this the right to choose our work and our homes, to travel, to marry whom we like, and so on. In the case of *Perchemlides v. Frizzle*, Massachusetts Superior Court Judge John Greaney ruled that the right of parents to control the education of their children must be considered as one of these Constitutionally protected rights. He located this right not only in the First and Fourth Amendments, as had frequently been held in other rulings, but also in the Ninth Amendment, which guarantees to citizens the right to control their private lives.

This right of parents to control the education of their children has over the years been upheld by many federal and state court rulings. The most important of these, the Constitutional bedrock on which home schooling stands, are *Pierce vs. Society of Sisters* (1925) and *Farrington vs. Tokushige* (1927).

In *Pierce* the U.S. Supreme Court struck down an Oregon statute abolishing all private schools. It is worth noting that the Oregon legislature passed such a law for the very reason even now put forward by school authorities as an argument against home schooling, namely, that unless all children were compelled to attend uniform state schools, the parents of many of them might be able to pass on to them various kinds of bad and dangerous ideas. Several schools, Catholic and secular, took the matter to the U. S. Supreme Court. The Court ruled that while the states were Constitutionally permitted (on very narrow grounds, of which more later) to control and regulate the education of children, they could not say that all children had to be educated in the same places or in the same way, but that parents had a right to get for their children an education in harmony with their own principles and beliefs. In effect, the Court said that the state could not run an educational monopoly, a fact not understood by too many educators even today.

In *Farrington* the Court reaffirmed and strengthened this position. At issue here was a set of regulations which the then territory of Hawaii was seeking to impose on all private schools, most notably a system of Japanese language private schools. These schools took the regulations to court, saying that they were so detailed and restrictive that their effect would be to destroy the unique identity of the Japanese language schools and to force them instead to become identical to the public schools. The Supreme Court struck down the regulations saying, in effect, that the states could not do through regulations what it had already said they could not do through laws, i.e., impose an essentially uniform system of education on all citizens.

In Kentucky, two years or so ago, the State Board of Education tried to close down a number of private

religious schools on the grounds that they were not following the state prescribed curriculum and that their teachers were not certified. The private schools, very ably defended in this case by William Ball of Harrisburg, Pa., challenged the state to show that its regulations had produced better results in its own schools, and that certified teachers could teach better than uncertified. In his decision upholding the private schools, District Judge Henry Meigs said, "Expert testimony in this case certainly established that there is not the slightest connection between teacher certification and enhanced educational quality in State schools, nor is there generally any such requirement in private schools." The decision was upheld by the State Supreme Court and left to stand by the U.S. Supreme Court.

Since then, courts in three other states have challenged the state to show evidence for the superiority of certified teachers, with the same result - the states could not, for in fact no such evidence exists. It is indeed easily verifiable that the most notable, selective, and successful of the nation's private colleges and secondary schools have on their faculties very few people with teacher's certificates or training in education.

In many other states, including Illinois, Massachusetts, New Jersey, and Indiana, courts have ruled that the rights established in *Pierce* and *Farrington* extend to parents who wish to teach their own children. It is clear, then, that the activity of home schooling rests on very solid Constitutional ground.

Against the right of parents to control their children's education must be balanced an opposing right, the right of the people in society to insure that all children are educated, and so to enact and enforce compulsory education laws. The Supreme Court has upheld this right many times, usually against claims of a religious nature. But it is important to understand that the Court has upheld this right on one ground and one only, namely, that under the police powers reserved to them, the states may protect society against the possibility that children may grow up

so ignorant that they will be a burden to the society, unemployable and unable to carry out the minimum duties of citizenship. Anything the states may wish to do in their schools, if contested on Constitutional grounds, must be measured against this standard.

In other words, just because the Court has upheld compulsory education as being permitted under the Constitution, it does not follow that the state schools have a Constitutional mandate for anything and everything they may happen to want to do. Except for things specifically illegal, they may do whatever they want - provided that nobody objects. It is only when parents object that the Constitutional power of the schools to do what they are doing comes into question.

Thus, most people are more or less content to have the schools teach, as final and permanent truths, the latest theories of scientists, physical and social. But when some parents say, as more and more now say, "We don't want our children to be told that this or that scientific theory is true, or even that truth can only come out of scientific laboratories," then we have to ask whether the courts have given the state schools a Constitutional mandate to teach such "truths." The answer is that they have not - unless they can show that children who do not believe these school-proclaimed "truths" are likely to become a burden to the state. In short, the schools have no Constitutional mandate to declare that some ideas are good and others bad.

Let us face squarely this question in its most difficult form. Suppose some parents were teaching their children that all people of a certain skin color or religion or national origin or political persuasion were so evil that the children had a moral duty to kill them on sight. Would the state not then be able to say that it had the legal power to prevent the parents from teaching those beliefs? In such a case, the courts could be expected to apply the rule of "clear and present danger." In other words, the state, in order to step in legally, would have to show that there was an immediate danger that the children would put those

ideas into action.

After all, many established religions teach their believers that all non-believers are enemies. Many Christian sects teach that non-Christian, or even Christians of other sects, are heretics, evil, damned, agents of Satan, etc. Black Muslims were for a while and may still be teaching, as part of their religion, that all white people are devils. Yet nowhere have the courts denied such people and such religious institutions the right to spread such beliefs.

Even if they did hold that in some particular case there was a clear and present danger that the children would commit the crimes their parents were telling them to commit, the courts would not be so foolish as to say that the remedy for this was to send the children to school, so that they could there be taught correct ideas. If the danger was truly clear and present - remember Justice Holmes' example of a man snouting "Fire!" in a crowded theatre the only @ble remedy for the state would be to remove the children from the custody of the parents altogether. But no parents, even members of the Nazi party or Ku Klux Klan, have ever been deprived of the custody of their children for this reason.

It seems clear, then, that we cannot say that because under some special circumstances the teaching of certain bad ideas to certain children might present a clear and immediate danger to the state, the schools must therefore be considered to have a general Constitutional mandate to stamp out bad ideas and spread good ones. Who would have the power to decide which ideas were good and which bad? How would we elect or appoint our Commissar of Correct thought? The notion is as abhorrent as it is absurd. It follows, then, that the schools cannot Constitutionally prohibit parents from teaching their own children on the grounds that they might be teaching some bad ideas or not teaching some good ones - unless, as I have said before, they could show that because of having or not having these ideas children would grow up unemployable and a burden to the state.

By the same token, most people are willing to accept the "social life" of the schools, on the grounds that it is some kind of preparation for "Real Life," by which they almost always mean something bad, that cannot be changed but must only be endured. (A strange way for a free people to talk!) As long as no one complains, no Constitutional issue is raised. But when some parents say, as more and more do, "We don't approve of this social life and the values it teaches, and we don't want this social life for our children," then we must ask, as before, do the schools have a Constitutional mandate to provide some kind of approved social life for children? The answer is, they do not. Can the schools show convincing evidence, or any at all, that unless children have this school-type social life they are likely to become a burden to the state? They can not. Indeed, a strong case could be made that the social life of many schools tends to destroy rather than create positive and healthy attitudes toward work. (One brief example would be the prevalence of cheating, even in our supposedly "best" schools.)

It was just for such reason that Massachusetts Superior Court Judge Greaney, in *Perchemlides v. Frizzle*, ruled that the local school district could not use the absence of a school-like social life as a reason for disapproving of a family's home education program.

Many parents seem willing to accept, perhaps because they believe in it, perhaps because they can't imagine anything else, a method of education based on the assumption that children will not learn anything important unless made to, and that the best way to make them is to give them long lists of disconnected facts to memorize and repeat on demand. But other people, myself among them, believe very strongly that these conventional methods of education do not help learning but instead prevent it, and destroy most of children's desire and ability to learn. Many parents say, "Until they went to school, our children were curious, eager, confident, resourceful, independent, skillful learners. Now we see them becoming every day more and more board, uncurious, unmotivated, dependent timid, self-dispising, too terified of failure to be willing any more to try the new or explore the unknown. Why must we put up

with methods of education that are destroying the intelligence and character of our children?"

There is no Constitutional reason why they should. In fact, the state schools cannot show that anything they do produces better results than other methods - not their choice of what subjects to teach, or the ages at which they teach them, or their ways of teaching them, or their ways of teaching, testing, evaluating, grouping, and scheduling, or their textbooks and other materials. Often, as in Kentucky, they can not even show that their results are as good. There are many schools all over the country whose curricula and methods are completely different from the state schools, like montessori schools, or Waldorf (Steiner) schools, where children are not formally instructed in reading until the age of 10, that have shown outstanding results. Still other schools do achieve equally successful results in spite of having very little formal curriculum or none at all.

But even if the state schools could show that their curricula etc. did in fact produce substantially better results, they still would not have the power under the Constitution to impose these on all parents. For what the Supreme Court in *Pierce* and *Farrington* said to the states was not that they could impose a uniform system of education on all parents, provided only that they show that it produced better results. It said that they could not impose a uniform system at all. The schools, in other words, can not tell parents how they must educate their children unless they can show that without such restrictions some children might become a burden on the state.

Let me sum up what I have said here. The courts have held that parents have a Constitutional right to exercise control over the education of children, and the schools have the power also to exercise control over the education of children. But the rights of the parents are very broad, the power of the schools very narrow. Some might argue that the power of the state and the schools, as defined here, are so narrow as to be equal to no power at all, but that is not the case. The state does not have power under the Constitution to tell parents how to educate their children, but it does have the power to assure itself that they are in fact doing something, and that what they are doing is not manifestly harmful. Thus the state would be altogether justified in being very skeptical and critical of the educational proposals of parents who were alcoholics or heavy drug users, or in constant trouble with the law, or whom it knew, or had strong reason to suspect, were physically neglecting or abusing their children.

How then might, and should, the state exercise its power in the matter of home schooling? As good fortune would have it, what the state has a Constitutional power to do is the very thing that it would be wisest to do anyway, which is to say to parents who wish to educate their children, as some school districts are already saying, "Tell us what you want to do in educating your children, and why you want to do it, and how you plan to assess it; send us a report once a year or so about what your children are doing and learning; don't hesitate to ask us for advice or help; and above all, feel free to use our schools and their many resources whenever you wish."

Several school districts in the state have said to home schooling families that their children are welcome to use the school when and as they wish, i.e. to use the library, take a special course, sing in a chorus, play a sport, go on a field trip, or whatever. Clearly a school system that has declared itself a friend and supporter of a home schooling family is much more likely to know what they are really doing, and to be in a position to help them, than a school that has told a home schooling family that they can't teach their own children at all or can only do so if they use methods identical to the school's.

There is, after all, an inherent conflict of interest and a possibility for injustice when we ask state schools to evaluate the merits of a family's home schooling plan. It is a little like telling people they can own any kind of car they want, as long as they have the approval of the local General Motors dealer. Judges must disqualify themselves in cases where they have a personal and/or material interest. Yet the state schools, with their declining budgets, can hardly be disinterested evaluators of family education plans; many a

school superintendent has flatly told a family that he would not let them teach their children at home because of the state aid he would lose. (Though it is not clear why schools should not be able to collect state aid for children they are helping to learn at home, as they would if these children were being tutored at home only because they were ill.) People asked to assess home schooling plans should, at the very least, be disinterested, and should not disapprove of home schooling on principle.

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