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Is Home Schooling Constitutional?

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I. INTRODUCTION

With increasing violence, poor academic standards, and the prevalent use of drugs in public schools, many parents now teach their children at home.[1] Parents who place their children in home schooling do so for these and a variety of reasons. Those who choose home schooling often see public schools as too traditional and conservative.[2] Others choose home schooling because they feel that public schools are too liberal or devoid of the moral and religious instruction they see as crucial to the education of one's child.[3] Most parents—many of them former teachers—feel that they can better meet the individual needs of their children through home schooling.[4] Regardless of their differing reasons for choosing home schooling, these groups have two things in common: a rejection of the ideal of the U.S. public schools as a melting pot and a willingness to defy the law in the interests of their children.[5]

Traditionally, compulsory school attendance laws have served as a mechanism for enforcement of maintaining minimum educational standards.[6] These laws almost always mandate fines and jail sentences for parents who fail to comply.[7] The parental right to educate one's child is not an explicit individual right listed in the Constitution. However, the Supreme Court has found this right to be fundamental.[8] State courts have been left to decide to what extent the state can regulate education.

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1. "John Holt, an educator and author whose Boston-based organization, Holt Associates, provides support services for home instruction, estimates that there are more than 10,000 families educating their children at home in defiance of compulsory education laws. Others believe the number to be much higher." Note, *State Regulation of Private Education*, 64 PHI DELTA KAPPAN 118, 119 (1982).

2. *Id.* at 119.

3. *Id.*

4. Note, *An Overview of Home Instruction*, 68 PHI DELTA KAPPAN 510, 512 (1987).

5. *Supra* note 1.

6. Holt, *supra* note 1, at 120

7. *Id.*

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

This paper examines traditional beliefs concerning parental rights to educate their children and how the Supreme Court has balanced parental and state interests concerning education. The paper further analyzes how states have regulated home schooling in compulsory education statutes. The concluding section addresses specific Utah statutes and how they compare with recent Supreme Court and other state court decisions.

II. TRADITIONAL CONCEPTS CONCERNING EDUCATION

Following English common law, American colonists took responsibility for the education of their children.[9] According to Blackstone, "The right and obligation of parents to direct the intellectual and moral upbringing of their children was as important as the right and duty to feed, clothe, and otherwise tend to the basic needs of the offspring."[10]

School Bd. Dist. v. Thompson demonstrates societal expectations of the time.[11] In *Thompson*, the Court recognized that

> at common law the principal duties of parents to their legitimate children consisted in their maintenance, their protection, and their education. While the municipal laws took care to enforce these duties, yet it was presumed that the natural love and affection implanted by Providence in the breast of every parent had done so more effectively than any law. For this reason the parent, and especially the father, was vested with supreme control over the child, including its education. Except where modified by statute, that authority still exists.[12]

Because of this common law notion, few colonies enacted statutes concerning education, and those that did provided no means for enforcement.[13]

Following the thoughts of the colonists, the framers of the Constitution did not specifically address the issue of education. Perhaps the founding fathers thought that education was so obviously a parental function, that they need not address it.[14]

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9. Sch. Bd. Dist. v. Thompson, 103 P. 578, 579 (1909).
10. Blackstone, COMMENTARIES, 450-52 (1771).
11. Sch. Bd. Dist., 103 P. at 578, 579.
12. *Id.*
13. Note, *Chalk Talk: Evolution of Parental Rights in Education*, 16 J.L. & EDUC. 339, 340 (1987).
14. *Id.* at 341. In *Meyer v. Nebraska*, the Supreme Court recognized rights to marry, raise children, and acquire useful knowledge, but did not list specifically the right to educate one's child.

Or, the parental right to educate one's child may be thought of as an individual right that the Constitution does not list explicitly, but has been found by the Court to be fundamental.[15]

III. How The Supreme Court Has Dealt With Education

The first Supreme Court decision recognizing the parental right to oversee one's child's education was the 1923 case of *Meyer v. Nebraska*.[16] A Nebraska law which forbade the teaching of any language other than English was struck down as a violation of substantive due process.[17] Today, the Due Process clause is most meaningful as a protection of individual rights. The Court recognized rights to marry, raise children, and acquire useful knowledge. These rights are essential and cannot be taken away by the states without due process of law.[18] However, the Court limits parental rights by stating that their right may be subject to reasonable state restrictions.[19]

Two years after *Meyer*, the Court clarified the importance of the parental role in education in the landmark case, *Pierce v. Society of Sisters*.[20] An Oregon statute requiring all children to attend public schools was struck down, again on the basis of substantive due process. The Court not only emphasized the right of parents to educate their children, but suggested that it is a parental duty: "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."[21]

Four years later, the Court in *Farrington v. Tokushige*[22] struck down a federal law in the territory of Hawaii under the due process clause of the Fifth Amendment. The statute was enacted to restrict what was taught in private schools in order

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15. A "fundamental interest" is a basic, constitutionally protected right with which the government may not interfere without a compelling reason. Since parental liberty has been included as one of these protected rights, state government cannot interfere without a compelling reason to override this liberty. *See Supra* Note 8, at 401-3.

16. 272 U.S. 390 (1923).

17. The Fourteenth Amendment Due Process Clause prevents "any state [from depriving any] person of life, liberty, or property without due process of law." *See Supra* note 8, at 399.

18. *Id.*

19. *Id.* at 402

20. 268 U.S. 510 (1925).

21. *Id.* at 535.

22. 273 U.S. 284 (1927).

to assimilate and indoctrinate aliens with American ideals. The Court said that this went "far beyond mere regulation [of private schools] where children obtain instruction deemed valuable by their parents and which is obviously not in conflict with any public interest."[23]

These decisions were based on due process rather than individual rights contained in the First Amendment because the amendment had not yet been made applicable to the states.[24] However, Justice Douglas later suggested that these cases could be considered "peripheral" First Amendment rights.[25] The concurring opinion in that case upheld the right to privacy in family relations under the Ninth Amendment: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."[26]

Although the Supreme Court has never reviewed the right to home schooling, the Court has held that the right to direct one's child's education does fall within free exercise of speech and religion clauses of the Constitution.[27] Generally, when a First Amendment interest can be found, the Court weighs the interest of the state against an individual family's freedom to determine a child's education. As a constitutionally protected right, the Court maintains that the government may not interfere with private educational decisions concerning one's child without a compelling reason.[28]

Twenty years after *Pierce*, the Court struck down a school board restriction on First Amendment grounds. In *West Virginia State Board of Education v. Barnette*,[29] the Court held that under the right of free speech, a child should not be compelled to salute the flag or recite the pledge of allegiance as a requirement of attending public school. However, it was the First Amendment's right of free speech of the parents which the Court sought to protect. The students who were refusing to salute the flag were being counted as "unlawfully absent" from school and subject to delinquent proceedings. Parents of these children

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23. *Id.* at 298.

24. Since then, the Supreme Court has held that the 14th Amendment's Due Process clause incorporates rights guaranteed at the federal level by the Bill of Rights, including the First Amendment. *Adamson v. California*, 332 U.S. 46 (1947).

25. Griswold v. Connecticut, 381 U.S. 479 (1965).

26. *Id.* at 492 (Citing Ninth Amendment)(emphasis omitted).

27. *Id.*

28. Murphy v. Arkansas, 852 F.2d 1039 (1988).

29. 319 U.S. 624 (1943).

were subject to fine and imprisonment. The parents brought suit to stop this enforcement. The parents, who were Jehovah's Witnesses, were trying to instill in their children certain values. The Court upheld the parents' First Amendment religious right in this regard. The Court stated, "If there is any fixed star in our Constitutional constellation, it is that no official . . . can proscribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[30]

The trend in modern cases deciding these issues based on First Amendment rights continued in *Wisconsin v. Yoder*.[31] Parents who were members of the Old Order Amish religion refused to send their children to public school beyond the 8th grade in violation of state compulsory attendance law. The Supreme Court held that the parental interest overshadowed state interests, declaring as fundamental, "parental direction of the religious upbringing and education of their children."[32] *Yoder* approved the parents' right to educate their child at home when public or private schools did not support the religious values of the family. The Court stated that the Amish made a "convincing showing, one that probably few other religious groups or sects could make." The Supreme Court's comments in *Yoder* on any similar secular-based rights were even more limiting:

> 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 times and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious and such belief does not rise to the demands of the religion clauses.[33]

This holding, however, has been narrowly construed, and seems to foreclose any secular right of parents to choose an alternative school. This narrow reading of the First Amendment right is borne out in recent state court decisions, which are analyzed in the following section.

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30. *Id.* at 642.
31. 406 U.S. 205 (1972).
32. *Id.* at 214.
33. *Id.* at 236.

IV. COURT DECISIONS REGARDING STATE EDUCATIONAL STATUTES

The Supreme Court's only power over state judgments is to correct them when they incorrectly adjudicate federal rights.[34] If a decision appears to rest primarily on federal law, the Court assumes that the state court felt bound by federal law unless it clearly states that its decision rests on an adequate and independent state ground.[35] However, federal courts sitting in diversity must apply the law of the state in which they sit in the absence of applicable federal law or federal lawmaking authority.[36]

In *State v. Riddle*,[37] a West Virginia case, the Supreme Court of West Virginia found that *Yoder* did not apply when parents taught their children at home because they believed the public schools had a destructive influence on them. *Yoder* supported the parents' right to educate a child at home only when public or private schooling did not sufficiently support the family's religious principles. *Riddle* may spark a successful constitutionally-based challenge to a state compulsory education statute on non-religious grounds, which would amplify a parent's right to educate one's child in the context of home education.[38]

However, in *Scoma v. Board of Education*,[39] a United States district court distinguished *Yoder* by saying:

> The plaintiff's asserted right to educate their children 'as they see fit' and 'in accordance with their determination of what best serves the family's interest or welfare,' does not rise above a personal or philosophical choice and cannot be a claim to be within the bounds of the Constitution.[40]

Yoder only said that philosophy does not fit within the Religion Clause; in *Scoma*, the Court says that philosophy does not fit within any clause of the Constitution.

A new wave of cases — testing not whether home schooling should be permitted, but the extent to which states may regulate

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34. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).
35. Michigan v. Long, 463 U.S. 1032 (1983).
36. Erie R.R Co. v. Thompkins, 304 U.S. 64 (1938).
37. 285 S.E.2d 359 (1981).
38. Michigan v. Long, 463 U.S. 1032 (1983).
39. 391 F.Supp. 452 (N.D.Ill. 1974).
40. *Id.* at 461.

it — is on the horizon.[41] The teacher certification requirement, for example, is undergoing litigation in the three states that require it, and it seems likely that there will be future litigation regarding the authority of the state to regulate the content of the curriculum of home schools as well.[42]

These regulations raise serious questions about violation of the free speech rights of the individuals involved. The Supreme Court has indicated that states have a legitimate interest in the education of children and may specify reasonable regulations governing private school curriculum.[43] But the Court has never extended this dictum to state control over the selection of specific materials or to state prescription of every subject to be taught.[44] The Court has limited a state's control by mandating that the state must pursue the least drastic means of achieving a compelling state interest.[45] It seems unlikely, however, that there would be a compelling state interest to prescribe or censor textbooks.

In a West Virginia case, parents challenged a statute that made home schooling ineligible for children whose standardized test scores fell below the 40th percentile and did not improve after remedial home schooling.[46] The parents maintained that the statute violated their liberty interest in controlling the upbringing and education of their children. Using a balancing approach, the court determined that the education of children can be subject to reasonable state regulation.

In *Null*, the court determined that the state regulation was reasonable, balancing the likelihood of harm if the child were put back into public education against the state's interest in educating its citizens. It was found that no irreparable damage would take place and that "providing public schools is one of the most important functions of the state."[47]

Parents in *Murphy v. Arkansas*[48] also challenged required standardized testing for home schoolers. Contrary to *Null*, parents in *Murphy* challenged a statute based on the Free Exercise clause of the First Amendment. The court first inquired

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41. Note, *supra* note 4, at 514.
42. *Id.*
43. *Meyer*, 262 U.S. 390 (1923).
44. Note, *supra* note 41.
45. Meyer v. Nebraska 262 U.S. 390 (1923).
46. Null v. Jackson, 815 F.Supp. 937 (1993).
47. *Id.* at 939.
48. 852 F.2d 1039 (1988).

whether the statute interfered with sincerely held religious beliefs. The plaintiff parents were Evangelical Christians who believed that parents are "completely responsible for every aspect of their children's education."[49] The court held that this was a sincere religious belief. However, the court said that they were not a suspect, discreet and insular minority.[50] Therefore, the state needed only to prove that there was a rational basis for the statute. The court upheld the statute on the grounds that the government has a compelling interest in educating all of its citizens, and that upward mobility through education is an integral part of American society.[51]

On the grounds of equal protection, the Murphy's contended that the state appeared to irrationally allow parents to educate their children in religious private schools without any state regulatory supervision; whereas, children schooled at home were subject to the various requirements of the Home School Act. They further claimed that parents who school their children at home are a suspect class, and thus, strict scrutiny should be used by the court in determining discriminatory effect.

The court found that the plaintiffs could not prove the intent of the statute was to discriminate against home schoolers on the grounds of equal protection.[52] However, the court did recognize that the statue may have a discriminatory impact on deeply religious individuals compelled to teach their children at home, but because a discriminatory purpose or intent by the legislature could not be proven, the statute was upheld. Therefore, the statute requiring home schoolers to achieve certain minimal scores on standardized tests was upheld as constitutional.

V. HOW UTAH CONFRONTS THE ISSUE OF HOME SCHOOLING

The Utah courts have not directly addressed the home schooling issue, though home schooling is becoming more prevalent in Utah.[53] Utah's Alpine School District reported that 180 pupils in that district were being taught at home on a part or full-time basis.[54] Many parents opt to allow their

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49. *Id.* at 1041 (emphasis omitted).

50. Carolene Products v. United States, 304 U.S. 144, 150 (1944).

51. 852 F.2d at 1043 (1988).

52. *Id.* at 1046.

53. Telephone Interview with Barbara Thomas, Superintendant of Alpine School District (March 23, 1994).

54. *Id.*

children to learn the basics at public school, and take their elective credits at home.[55] Utah Code § 53A-11-101 states the compulsory Education Requirement for Utah.[56] Section 53A-11-102 states that:

> The minor is excused from attendance by the local board of education for one of the following reasons: (b)(ii) the minor is taught at *home* in the subjects prescribed by the State Board of Education in accordance with the law for the same length of time as minors are required by law to be taught in the district schools.[57]

The statute further reads, "In accordance with Title 63, Chapter 216a, Utah Admin. Rulemaking Act, the State Board of Education shall make rules for purposes of dual enrollment to govern and regulate the transferability of credits toward graduation that were earned in a private or home school."[58]

Utah law requires certain subjects and credit hours in a home schooling situation.[59] The State Board of Education requires school to be held 180 days each year. Time requirements are as follows: (1) One-half day for Kindergarten; (2) Four and one-half hours per day or 22.5 hrs. per week for grade one; (3) Five and one-half hours per day or 27.5 hrs. per week for grades two through twelve.[60]

In addition to state regulations for the content and hours of schooling which home schoolers must meet, each district specifies what must be done to obtain a high school diploma. In Alpine School District, for example, only credit obtained from a state accredited school can be applied toward high school graduation.[61] If the home school has not been accredited by the Utah State Department of Education, the credit received from the home school cannot be applied toward high school graduation.[62]

Although some districts may require home school accreditation, Utah's rules are very liberal and accommodating to home schools in comparison with other states. Some states require that the parents have some type of certification or training

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55. *Id.*
56. Utah Code Ann. § 53A-11-101 (1994).
57. Utah Code Ann. § 53A-11-102(1)(b)(ii) (1994) (emphasis added).
58. Utah Code Ann. § 53A-11-102.5(5) (1994).
59. Utah Admin. R. 277-701-1 (1994).
60. *Id.*
61. Application for home schooling in Alpine School District.
62. *Id.*

before they can teach their children at home.[63] Others require standardized testing, requirements concerning where the home schooling must take place, and some even refuse to allow home schoolers to use texts from the public schools.[64] In contrast, Utah's only requirements are that the same subjects are taught and the same number of hours are spent studying.[65] The ambiguity arises in determining how a home school becomes accredited by the State Department of Education. The statute is silent on this aspect and even the public schools are unsure as to the procedure for home school accreditation.[66]

VI. CONCLUSION

The issue of parental rights and duties to educate one's child is not new. Common law principles were based on notions that the duty of the parents was to provide maintenance for their children. One of the most important of these parental duties was to educate their children. The Supreme Court has upheld the parental interest to educate one's child under the Bill of Rights' freedom of speech and religion interests. The right has also been held to be "fundamental" under substantive due process. State courts have construed Supreme Court decisions very narrowly and have rejected arguments by parents based upon First Amendment rights, but have made certain exceptions for parents who school their children at home solely for religious reasons. Several state courts have upheld statutes that require standardized testing and certification for parents of home schoolers. Although Utah courts have not dealt directly with the issue, compulsory education statutes have been written broadly enough to encompass home schooling. The only major restriction on home schooling in Utah is that it be state accredited. Because the procedure of accreditation is vague and inaccessible, it will most likely be an issue for future litigation.

Wendy Wheeler

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63. Holt, *supra* note 1, at 120-21.

64. *Id.*

65. Utah Code Ann § 53A-11-1-1 (1994).

66. Thomas, *supra* note 53. I was referred by the Alpine School District Superintendent to the State Board of Education as to how a home school becomes accredited. No one at the state office would respond to my inquiries concerning the procedure of accreditation.