



Written by [Joe Wolverton, II, J.D.](#) on October 29, 2018

## Is There a Constitutional Right to Homeschool?

A concurring opinion published in a case decided recently by the Georgia Court of Appeals asserts that parents have a constitutionally protected right to homeschool their children.

In his concurring opinion in the child-custody case of *Borgers v. Borgers*, Judge Stephen Dillard, chief judge of the Georgia Court of Appeals, delivered an impassioned and erudite defense of absolute parental sovereignty over their children's training.



"The liberty interest of parents to direct the upbringing, education, and care of their children is the most ancient of the fundamental rights we hold as a people," Judge Dillard declared.

Dillard's concurrence continued in an equally compelling tone:

This cherished right derives from the natural order, preexists government, and may not be interfered with by the State except in the most compelling circumstances. And while I agree with the majority that the trial court lacked the authority to alter the parties' custody agreement in this contempt action, I write separately to express my serious concerns with the court's decision to summarily substitute its judgment regarding the child's education for the mother's without identifying evidence of the compelling circumstances necessary to interfere with her constitutional parental rights. In doing so, the trial court failed to give sufficient consideration to the federal and Georgia constitutions, both of which afford significant protection of a parent's right to the care, custody, and control of his or her child — which undoubtedly includes the right to make educational decisions.

Curiously, there are those in the conservative community who, although agreeing with Dillard's reasoning on policy grounds, refuse to recognize any constitutional protection for parents' educational prerogative.

Legal expert and UCLA law professor Eugene Volokh penned a blog post on October 23 publicizing Judge Dillard's opinion. In commenting on the concurrence, Volokh vaguely shared his own opinion on the legal status of parents who homeschool.

"I personally think that defining the scope of parental rights is a complicated matter, and while I support the right to homeschool on policy grounds, I'm not positive that it should be recognized as a constitutional right," Volokh explains.

Not that it matters in the context of constitutional rights, but a Supreme Court decision handed down in 1925 is similarly difficult to define.

In the case of *Pierce v. Society of Sisters*, the Supreme Court held:

No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic



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disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.

Notice that the Court doesn't presume to protect the right of parents to control their children's education. The justices, in fact, make a judicial grant of authority to "the state" to "reasonably regulate all schools." That would include, one assumes, schools that are conducted at home, rather than at a designated school building.

Some states exercise this presumed power by treating homeschooling parents as if they were state employees, as are public- and charter-school teachers. Not only do parents not get paid from the state coffers, but parents have their paychecks raided by the state so those coffers are full enough to fully fund the salaries of scores of teachers.

Among many homeschool families and advocates, the lack of a constitutionally protected right to school choice is a hole in the Constitution that needs to be filled with an amendment.

Pointing to a statement made in November 2015 at an event at Georgetown University by the late Supreme Court Justice Antonin Scalia that the right to homeschool is "simply not in the Constitution," former director of federal relations for the Home School Legal Defense Association (HSLDA) William Estrada warned homeschool families that "we do indeed need an amendment to the U.S. Constitution that enshrines the current Supreme Court precedent protecting parental rights in the black-and-white text of the U.S. Constitution."

A correct understanding of the Constitution — its history, structure, and federal function — would reveal that the right of parents to homeschool their children should NOT be guaranteed by the Constitution.

The Constitution was created by the states to carry out a "few and defined" delegated powers, while the states would retain "numerous and indefinite" powers. The federal authority would extend only to "external objects, as war, peace, negotiation, and foreign commerce."

The 10th Amendment explicitly excludes the federal government from functioning in any area not placed within its purview by the states in the Constitution.

Notwithstanding these straightforward tenets of constitutional construction, there is no denying that the national authority has repeatedly attempted to break down the boundaries placed by the Constitution around its power. From the beginning, our elected representatives have overstepped the limits drawn around their rightful authority and have passed laws retracting, reversing, and redefining the scope of American liberty and state sovereignty, and those efforts have invaded the formerly sacrosanct precinct of the family home.

Americans determined to exercise unqualified control of their children's education (and every other aspect of their lives) have a sacred duty to tirelessly resist such advances and exercise all our natural rights to restrain government and keep it within the limits set by the Constitution.

So, Scalia was right: There is no constitutional right to homeschool. That isn't because parents don't have that right, but because the U.S. Constitution was not designed to define the limits of our rights, but to define the limits of the power of the federal government.



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