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PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES RELATING TO PARENTAL RIGHTS

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

SECOND SESSION

ON

H.J. RES. 110

JULY 18, 2012

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PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES RELATING TO PARENTAL RIGHTS

WEDNESDAY, JULY 18, 2012

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 12:35 p.m., in room 2141, Rayburn House Office Building, the Honorable Trent Franks (Chairman of the Subcommittee) presiding.

Present: Representatives Franks, King, Conyers, and Scott.

Staff Present: (Majority) Jacki Pick, Counsel; Sarah Vance, Clerk; (Minority) David Lachmann, Subcommittee Staff Director; and Veronica Eligan, Professional Staff Member.

Mr. FRANKS. Pursuant to notice, the Subcommittee on the Constitution meets today to consider H.J. Res. 110, "Proposing an amendment to the Constitution of the United States relating to parental rights."

The question at the heart of the growing debate over parental rights is the same question that was at the heart of the American Revolution more than two centuries ago: What is the source of our rights? The European model held that God gave authority to kings and the government that would hold the rights of men in their hands. The Americans reverse engineered this model and recognized the true foundation of human dignity. We held these truths to be self-evident, that all men are created equal, and that they are all endowed by their creator with certain inalienable rights, and that government does not create those rights but merely exists to secure them. The State exists to preserve freedom.

Less than 100 years ago, no American would have believed we would ever need to enact laws to protect the rights of parents to direct the care and upbringing of their children because this right was considered so integral to our way of life and our rule of law. The Supreme Court affirmed this fact in its 1925 decision in *Pierce v. Society of Sisters* when it stated: "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."

Almost 50 years later, in the 1972 case of *Wisconsin v. Yoder*, the court reaffirmed this fundamental principle by stating: "The pri-

mary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."

The Supreme Court has thus recognized parental rights as fundamental rights which cannot be violated unless the State proves it has an "interest of the highest order which cannot be otherwise served."

The integrity of parental rights was threatened however in 2000 when the U.S. Supreme Court decided *Troxel v. Granville*. A four-judge plurality described parental rights as a fundamental, historically, but then declined to use this strict scrutiny test that attaches to this status.

In the wake of *Troxel*, Federal and State courts have permitted governmental intrusions onto parental rights ranging from the choice of a school to the most basic aspects of child rearing. State legislatures have restricted parental access to educational information, health records and even a list of books and media items that their children borrow from the library. Such mandates radically change the long-established authority structure between families and government by forcibly inserting the State between parent and child.

Parental rights also face external threats. International law, including widely ratified treaties like the U.N. Convention on the Rights of the Child, permits the State to override the decisions of fit parents if they believe that a contrary decision will benefit the "best interests of the child."

Even if the United States refuses to ratify a treaty, American courts could attempt to recognize a treaty's principles as a reflection of binding international norms and customs under the doctrine of "customary international law," and thus override all inconsistent State law.

Section 4 of the PRA ensures that treaties of other forms of international law cannot be used to override or modify parental rights. The truths, principles, and knowledge inculcated into the hearts and minds of our children dictate, more than any other human factor, the paradigm of America's future. One of two people will primarily choose the academic, philosophical and spiritual substance of what is placed in the hearts of a particular child. It will either be a bureaucrat who doesn't oftentimes even know the child's name, or a parent who would pour his or her last drop of blood out on the floor for that child.

Our answer to the question of how we will answer who that to be is one of inexpressible gravity. The purpose of the parental rights amendment is to ensure that the American time-honored standard which recognizes the liberty of parents to direct the education and upbringing of their children is fundamental. It is placed in the actual text of the Constitution as such. Neither shifting Supreme Court majorities or international law would be able to change the basic idea that parental rights are examined under the high legal standard for the protection of our rights that our Constitution describes as fundamental.

With that, I yield now to the Ranking Member of the Subcommittee, Mr. Scott, for his opening Committee.

[The resolution, H.J. Res. 110, follows:]

112TH CONGRESS
2D SESSION

H. J. RES. 110

Proposing an amendment to the Constitution of the United States relating to parental rights.

IN THE HOUSE OF REPRESENTATIVES

JUNE 5, 2012

Mr. FRANKS of Arizona (for himself, Mr. OLSON, Mr. COFFMAN of Colorado, Mr. MANZULLO, Mr. BISHOP of Utah, Mr. JONES, Mr. HUNTER, Mr. MURPHY of Pennsylvania, Mr. WOLF, Mrs. MYRICK, Mr. HARRIS, Mr. FORTENBERRY, Mr. LANDRY, Mr. UPTON, Mr. TIBERI, Mr. LATHAM, Mr. HULTGREN, Mr. JORDAN, Mr. HUIZENGA of Michigan, Mr. PLATTS, Mr. NUGENT, Mr. MCCLINTOCK, Mr. CANSECO, Mr. DUNCAN of South Carolina, Mr. WESTMORELAND, Mr. BONNER, Mr. ROSS of Florida, Mr. PITTS, Mr. LAMBORN, Mr. HARPER, Mr. NUNNELEE, Mr. FLEMING, and Mr. PALAZZO) introduced the following joint resolution; which was referred to the Committee on the Judiciary

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JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States relating to parental rights.

1 *Resolved by the Senate and House of Representatives*
2 *of the United States of America in Congress assembled*
3 *(two-thirds of each House concurring therein),* That the fol-
4 lowing article is proposed as an amendment to the Con-
5 stitution of the United States, which shall be valid to all
6 intents and purposes as part of the Constitution when

1 ratified by the legislatures of three-fourths of the several
2 States:

3 "ARTICLE—

4 "SECTION 1. The liberty of parents to direct the up-
5 bringing, education, and care of their children is a funda-
6 mental right.

7 "SECTION 2. Neither the United States nor any State
8 shall infringe this right without demonstrating that its
9 governmental interest, as applied to the person, is of the
10 highest order and not otherwise served.

11 "SECTION 3. This article shall not be construed to
12 apply to a parental action or decision that would end life.

13 "SECTION 4. No treaty may be adopted nor shall any
14 source of international law be employed to supersede, mod-
15 ify, interpret, or apply to the rights guaranteed by this
16 article.".

○

Mr. SCOTT. Thank you, Mr. Chairman.

I am just sitting in for the Ranking Member who is not able to be here, but I would like to ask unanimous consent that his statement be entered into the record.*

Mr. FRANKS. Without objection.

Mr. SCOTT. And I thank the witnesses, particularly Dr. Farris, for being with us today.

Mr. FRANKS. All right. Let me just then thank all of the witnesses for appearing before us today.

Our first witness, Dr. Michael Farris is founder and chairman of the Home School Legal Defense Association and founder and chancellor of Patrick Henry College. Since founding the Home School Defense Association in 1983, Dr. Farris has helped grow the organization to over 80,000 member families. Dr. Farris has written over a dozen books, a constitutional law textbook, and works on marriage, parenting, home schooling, political advocacy and religious liberty.

His daily radio program, "Home School Heartbeat" airs on several hundred stations nationwide. Education Week has named Dr. Farris as one of the top 100 faces in education of the 20th century.

Our second witness, Professor Martin Guggenheim, is the Fiorello LaGuardia professor of clinical law at the New York University School of Law, where he has earned his J.D. Professor Guggenheim focus on child law, child welfare law, and is the author of numerous articles, including, Ratify the U.N. Convention on the Rights of the Child, But Don't Expect any Miracles, in the Emory International Law Review and, Stealth Indoctrination for Speech in the Classroom, in the 2004 University of Chicago Law Forum. Welcome, sir.

Our third and final witness, Piero Tozzi, serves as senior legal counsel with the Alliance Defending Freedom, or ADF—and that name has changed slightly. Since joining the ADF in 2010, Mr. Tozzi has focused his litigation efforts on the international human rights law. He earned his JD from the Fordham University School of Law in 1996. Prior to joining ADF, Mr. Tozzi served as executive vice president and general counsel for the Catholic Family and Human Rights Institute, or C-FAM, while running its New York office where he lobbied the United Nations on social policy issues and established C-FAM's public interest law firm, the International Organizations Law Group. Welcome, Mr. Tozzi.

Each of the witnesses' written statements will be entered into the record in its entirety, and I would ask each witness to summarize his testimony in 5 minutes or less. To help you stay within that time, there is a timing light on the table. When the light switches from green to yellow, you will have 1 minute to conclude your testimony. When the light turns red, it signals the witness' 5 minutes has expired.

Mr. FRANKS. Before I recognize the witnesses, it is the tradition of this Subcommittee that they be sworn, so if you would please stand.

[Witnesses sworn.]

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*Ranking Member Jerrold Nadler (D-NY), did not submit a statement for this hearing.

Mr. FRANKS. I now recognize our first witness for 5 minutes, Dr. Farris.

TESTIMONY OF MICHAEL FARRIS, J.D., LL.M., CHANCELLOR, PATRICK HENRY COLLEGE

Mr. FARRIS. Chairman Franks, Mr. Scott, Members of the Subcommittee, thank you so much for holding this hearing and for your leadership on this issue.

In 1990, in the case of *Employment Division v. Smith*, the Supreme Court made a ruling that undercut our long-standing legal standard for the protection of the free exercise of religion. Shortly thereafter, under the leadership of this Committee, Congress introduced the Religious Freedom Restoration Act. I had the privilege as serving as the co-chair of the drafting committee for RFRA, and the even greater privilege of working closely with the Members and staff of this Committee in the passage of RFRA.

Mr. Nadler played a key role in the successful passage of RFRA, and I would be remiss if I failed to mention the important role that staff counsel, David Lachmann, performed in the effort to preserve religious liberty for all Americans.

RFRA received the ultimate form of bipartisan support, since the bill passed unanimously in the House, and I guess it was 97–3 in the Senate.

The situation our country faced with regard to RFRA is a perfect parallel to the situation we face today with regard to parental rights. There is overwhelming support in our Nation for both the free exercise of religion and the traditional right of parents to direct the upbringing, care and education of their children.

A 2010 Zogby poll found that 93.6 percent of Americans believe that parents should have the constitutional right to make decisions for their children without governmental interference unless there is proof of abuse or neglect. However, our current law does not match the belief of the American people.

Just as was the case regarding religious freedom, the problem with parental rights starts with a Supreme Court decision. In *Troxel v. Granville*, as the Chairman has already indicated, the Supreme Court ruled in favor of the parent, but did so in a way that has led to a serious erosion of the traditional constitutional principle of parental rights. Parents won that battle, but lost the war.

In *Troxel*, the court split six ways. And without going through my summary, all six of the opinions, suffice it to say, only Justice Scalia—excuse me, only Justice Thomas, rather, used the traditional test for parental rights, calling it a fundamental right and applying strict judicial scrutiny. But even Justice Thomas said in a properly briefed case, he might consider a different rule.

Justice Scalia is noteworthy in the fact that he said that even though parental rights are an inalienable right under the Declaration of Independence, that they are not constitutionally protected at all because there is no text of the Constitution to support parental rights. Until parental rights are in the text of the Constitution, Justice Scalia said, parents lose every single time.

This level of confusion at the Supreme Court has infected the lower courts with a growing level of discord as to the correct constitutional text, although some confusion existed even prior to

Troxel. My written testimony includes an appendix with a brief analysis of State and Federal parental rights cases since *Troxel*. I list 24 cases that have expressly rejected the use of the fundamental rights standard in light of the *Troxel* decision.

A pair of cases that I personally litigated explains the situation that parents face when attempting to protect their constitutional rights. Before the Supreme Court of Michigan, I argued two home schooling cases on the same day. The first was for the DeJonge family who defended their rights using a combination of religious freedom and parental rights. By a 4–3 vote, the Supreme Court of Michigan held that they had a fundamental right to do so.

But the Bennett family, who argued simply on the basis of parental rights, had a 4–3 victory snatched from them. Rather, they lost 4–3 on the basis that parental rights are not a fundamental right.

The net result in Michigan, according to that Supreme Court, is parents who are religious had the right to home school. But secular parents did not have the right to home school. One had fundamental freedoms; the other did not. It is my belief that all parents, whether secular, religious, or whatever religion, should have the fundamental right to make educational decisions for their children. It should not matter. But, in fact, it does matter.

I have personally litigated dozens, if not hundreds of cases, involving invasion of parental rights in medical decisions, educational decisions, religious decisions and much more. The caseload of one lawyer can only be the tip of the iceberg.

Parental rights are under assault, and the correct constitutional standard is not clear as a result of *Troxel*. Historically, the standard is clear. And the parental rights amendment does one big thing: It places the traditional test of parental rights into the black and white text of the Constitution. It follows the very words and principles of *Meyer v. Nebraska*, *Pierce v. Society of Sister,* and *Wisconsin v. Yoder*.

Congress can make history by taking bipartisan action to protect parental rights. Parental rights should not be diminished over time, and parents shouldn't have to guess whether or not their rights are fundamental. It should be in the black and white text of the Constitution.

Thank you.

Mr. FRANKS. Thank you, Dr. Farris.

[The prepared statement of Mr. Farris follows:]

Prepared Statement of Michael Farris, J.D., LL.M., Chancellor, Patrick Henry College

In 1990, in *Employment Division v. Smith,* the Supreme Court of the United States made a ruling that undercut our long-standing legal standard for the protection of the free exercise of religion. Shortly thereafter, under the leadership of this Committee, Congress introduced the Religious Freedom Restoration Act (RFRA).

I had the privilege of serving as the Co-chair of the drafting committee for RFRA and the even greater privilege of working closely with the members and staff of this Committee. Mr. Nadler played a key and leading role in the successful passage of RFRA. I would be remiss if I failed to mention the important role that staff counsel, David Lachmann, performed in that effort to preserve religious liberty for all Americans.

And RFRA received the ultimate form of bipartisan support—since the bill passed unanimously in the House and 98–2 in the Senate.

The situation our country faced with RFRA is an absolutely perfect parallel with the situation we face today with regard to parental rights.

There is overwhelming support in our nation for both the free exercise of religion and the traditional right of parents to direct upbringing, care, and education of their children. A 2010 Zogby poll found that 93.6% of Americans believed that parents should have the constitutional right to make decisions for their children without governmental interference unless there is proof of abuse or neglect. Regardless of party affiliation, racial group, or income level, America believes in the constitutional rights of parents in rates that exceed 90% in every one of these categories.

However, our current law does not match the belief of the American people. Just as was the case regarding the free exercise of religion, the problem with parental rights started with a Supreme Court decision. In *Troxel v. Granville,* 530 U.S. 57 (2000), the Supreme Court ruled in favor of the parent—but did so in a way that has led to a serious erosion of the traditional constitutional principle of parental rights. Parents won the battle in that case but lost the war.

In *Troxel,* the Court split six ways. Although, the plurality opinion noted that the Court's precedent had traditionally treated parental rights as a fundamental right, it refused to determine the precise constitutional standard applicable in such cases—preferring a case-by-case approach.

Justice Souter concurred, saying: "Our cases, it is true, have not set out exact metes and bounds to the protected interest of a parent in the relationship with his child." Parental rights are not fundamental but just "generally protected."

Justice Thomas was the only justice to actually use the compelling interest test applicable for a fundamental right. But he said that in a properly briefed case, he would consider a different outcome.

Justice Stevens dissented rejecting the idea of a fundamental parental right to make decisions for children.

Justice Kennedy also dissented, describing parental rights in language that illumed nothing and protects no one, saying: "The principle exists, then, in broad formulation; yet courts must use considerable restraint." Kennedy pointedly avoided labeling parental rights as "fundamental."

Justice Scalia also dissented in a way that surprises most people. He said that parental rights are a political concept only and not a constitutional right. Unless and until there is an actual provision of the Constitution which protects parental rights, judges have no business using the rights of parents to invalidate even the most invasive laws.

This level of confusion has infected lower courts with a growing level of discord as to the correct constitutional test—although some confusion existed even prior to *Troxel.* My written testimony includes an appendix with a brief analysis of state and federal parental rights cases since *Troxel.* Some 24 cases have expressly rejected the use of the fundamental rights standard in light of the confusion from *Troxel.*

A pair of cases that I personally litigated explains the situation that parents face when attempting to protect their constitutional rights.

Before the Supreme Court of Michigan, I argued two homeschooling cases on the same day. The first was for a homeschooling family, Mark and Chris DeJonge, who defended their right to homeschool using the combination of religious freedom and parental rights. By a 4 to 3 vote, the Supreme Court of Michigan held that religious parents had a fundamental right to direct the education of their children. *People v. DeJonge,* 442 Mich. 266 (Mich. 1993)

But the second case was for the Bennett family who had made only parental rights arguments for their right to homeschool. *People v. Bennett,* 442 Mich. 316 (Mich. 1993)

To me as a matter of justice, and as a matter of correct constitutional law, the outcome should have been the same. Religious freedom should be treated as a fundamental right. Parental rights should be treated as a fundamental right.

But the Supreme Court of Michigan saw it differently. They held that parental rights were not a fundamental right and specifically refused to use strict scrutiny.

Thus, according to that Court—the Constitution protects the rights of religious parents but not secular parents to direct the upbringing of their children.

This is just not right. All parents should have the fundamental right to direct the upbringing, education, and care of their children.

I have personally litigated dozens if not hundreds of cases involving invasions of parental rights in medical decisions, education decisions, religious decisions, and so much more. And obviously, the case load of one lawyer can only be the tip of the iceberg.

Parental rights are under assault. And the correct constitutional standard is not clear.

The principle reason for this confusion is that parental liberty is an implied right based on the shifting sands of a highly controversial doctrine called substantive due process.

Parents deserve better than shifting sand. Parents should not have to go through the process of counting heads on the Supreme Court to see whether or not their rights are considered fundamental. There is no certainty or confidence in that kind of approach.

The Parental Rights Amendment (PRA)does one big thing—it places the traditional test for parental rights into the black and white text of the Constitution. It follows the principles and employs the words of *Meyer v. Nebraska, Pierce v. Society of Sisters,* and *Wisconsin v. Yoder.*

The terms used in Sections 1 and 2 of the PRA are terms of art with over 80 years of litigation behind them. Just like we did with RFRA, we are carefully following the traditional legal standard and not trying to invent new rights or new legal formulas.

The Founding generation protected certain explicit rights in our Bill of Rights. The topics they chose were based on experience—where they had seen governmental invasions at some point in history. If the Founders could have seen the future where parental rights were being invaded by a government intent on running our private lives—I am absolutely confident they would have placed parental rights into the text of the Bill of Rights.

This Congress can make history by taking bipartisan action to protect parental rights.

The legal rights of parents should not be mired in confusion or be diminished over time. The right of parents to direct the upbringing, education, and care of their child should be in the black and white text of the Constitution of the United States.

APPENDIX

State and Federal Court Decisions, Decided since *Troxel,* which have Explicitly Rejected the use of Strict Scrutiny in Parental Rights Cases

Bethany v. Jones,—S.W.3d—, 2011 WL 553923 (Ark., February 17, 2011) (holding that even though "the Due Process Clause of the Fourteenth Amendment protects the rights of parents to direct and govern the care, custody, and control of their children," *id.* at *8, "our law is well settled that the primary consideration in child-custody cases [where a step-parent seeks visitation over the objection of a biological parent] is the welfare and best interest of the children; all other considerations are secondary" *id.* at *9).

Hensler v. City of Davenport, 790 N.W.2d 569, 581 (Iowa 2010) (applying rational basis scrutiny to a parental responsibility ordinance because "the ordinance does not intrude directly and substantially into a parent's parental decision-making authority, but instead only minimally impinges on a parent's fundamental right to direct the upbringing of his or her child," notwithstanding the general rule that whenever the power of the state "improperly intrude[s] into the parent's decision-making authority over his or her child," there is "an infringement of this fundamental parental right, triggering strict scrutiny," citing *Troxel,* 530 U.S. at 67).

In re Reese, 227 P.3d 900, 902–3 (Colo. Ct. App. 2010) (employing a "rebuttable presumption" in favor of parental visitation determinations, which can be rebutted by "clear and convincing evidence that the parent is unfit or that the parent's visitation determination is not in the best interests of the child," *id.* at 903; the rebuttable presumption is employed because *Troxel* did not "state[] how the presumption affects the proof process or how courts must accord special weight to it," *id.* at 902).

Cannon v. Cannon, 280 S.W.3d 79, 86 (Mo. 2009) (in a marriage dissolution proceeding regarding child custody, the court described *Troxel* as holding that "while a parent's interest in his or her children is entitled to 'heightened protection,' it is not entitled to 'strict scrutiny'").

Weigand v. Edwards, 296 S.W.3d 453, 458 (Mo. 2009) (applying a balancing-of-interest test to a statute governing modification of custody because "the Supreme Court utilized a balancing-of-interests standard in the context of a grandparent visitation statute" and "decided to leave the determination of the propriety of particular statutes to a case-by-case analysis").

Price v. New York City Bd. Of Educ., 51 A.D.3d 277, 292 (A.D. N.Y. 2008) (holding that "even if we were to hold that a fundamental liberty interest is at stake [because of a school rule prohibiting students from having cell phones], we would not apply strict scrutiny" because "there is no clear precedent requiring the applica-

tion of strict scrutiny to government action which infringes on parents' fundamental right to rear their children" given that *Troxel* "did not articulate any constitutional standard of review").

In re Guardianship of Victoria R., 201 P.3d 169, 173, 177 (N.M. Ct. App. 2008) (affirming a trial court's decision to award guardianship of a child to "psychological parents," to whom the mother had voluntarily given placement of the child, because evidence of potential psychological harm to the child overcame the presumption in favor of the biological parent, *id.* at 177; the court did not employ strict scrutiny, noting that "only Justice Thomas, in a concurring opinion, relied upon a fundamental rights-strict scrutiny analysis" and that "some authorities, noting that only Justice Thomas expressly relied upon textbook fundamental rights-strict scrutiny analysis, have read *Troxel* as moving away from the rigid strict scrutiny mode of analysis of state legislation that impinges on parents' control over the upbringing of their children," *id.* at 173 n. 4).

In re Adoption of C.A., 137 P.3d 318, 319 (Colo. 2006) (adopting a rebuttable presumption in favor of parental decisions, which can be rebutted by "clear and convincing evidence that the parental visitation determination is not in the child's best interests," because *Troxel* "left to each state the responsibility for enunciating how its statutes and court decisions give "special weight" to parental determinations").

Douglas County v. Anaya, 694 N.W.2d 601, 607 (Neb. 2005) ("It is true that "the custody, care and nurture of the child reside first in the parents." However, the Court has never held that parental rights to childrearing as guaranteed under the Due Process Clause of the 14th Amendment must be subjected to a strict scrutiny analysis. See *Troxel.* "[T]he Supreme Court has yet to decide whether the right to direct the upbringing and education of one's children is among those fundamental rights whose infringement merits heightened scrutiny." *Pierce* and *Yoder* do not support an inference that parental decisionmaking requires a strict scrutiny analysis") (internal citations omitted).

McDermott v. Dougherty, 869 A.2d 751, 808–9 (Md. 2005) (Adopting a balancing test where "the constitutional right [of parents] is the ultimate determinative factor; and only if the parents are unfit or extraordinary circumstances exist is the "best interest of the child" test to be considered").

Barker v. Barker, 98 S.W.3d 532, 535 (Mo. 2003) (holding that, under *Troxel,* "the trial court was required to consider the parents' right to make decisions regarding their children's upbringing, determine the reasonableness of those decisions, and then balance the interests of the parents, child, and grandparents in determining whether grandparent visitation should be ordered").

Doe v. Heck, 327 F.3d 492, 519–20 (7th Cir. 2003) (applying a "reasonableness" test, akin to Fourth Amendment analysis, when balancing "the fundamental right to the family unit and the state's interest in protecting children from abuse," *id.* at 520, because "after *Troxel,* it is not entirely clear what level of scrutiny is to be applied in cases alleging a violation of the fundamental constitutional right to familial relations," *id.* at 519).

In re Marriage of Winczewski, 72 P.3d 1012, 1034 (Or. Ct. App. 2003) ("In *Harrington,* we expressly rejected the strict scrutiny standard asserted by Justice Thomas in *Troxel* and indicated that 'the plurality opinion [in *Troxel*] gives the best guidance on the effect of the constitution in this situation'").

Blakely v. Blakely, 83 S.W.3d 537, 546 (Mo. 2002) (Although the majority [in *Troxel*] did not articulate the specific standard of review it was applying, it did not apply the strict scrutiny standard advocated by Justice Thomas. Instead, after identifying the kinds of factors that led it to invalidate the application of the Washington statute to the facts before it, the Court decided to leave the determination of the propriety of particular statutes to a case-by-case analysis").

In re Custody of C.M., 74 P.3d 342 (Colo. Ct. App. 2002) (noting that the court in *Troxel* "did not specify the appropriate level of scrutiny for statutes that infringe on the parent-child relationship" and "did not decide whether the state's interest was a compelling one.").

Leebaert ex rel. Leebaert v. Harrington, 193 F.Supp.2d 491, 498 (D. Conn. 2002) ("Supreme Court precedent is less clear with regard to the appropriate standard of review of parental rights claims. However, the Second Circuit has concluded that a parental rights challenge to a school's mandatory community service requirement warranted only rational basis review. *Troxel* does not establish a different rule requiring strict scrutiny of parental challenges to educational policies of public schools").

Nicholson v. Williams, 203 F.Supp.2d 153, 245 (E.D. N.Y. 2002) (noting that "[t]he plurality [in *Troxel*] apparently saw no need to vocalize a standard of review," and that "[u]nderstandably, the Supreme Court and other courts have hesitated to apply strict scrutiny mechanically and invariably to government legislation and policy that infringes on familial rights. Even as it has recognized the sanctity of familial rights, the Court has always acknowledged the necessity of allowing the states some leeway to interfere sometimes").

State Dept. of Human Resources v. A.K., 851 So.2d 1, 8 (Ala. Ct. App. 2002) (holding, over the dissent's objection based on *Troxel,* that "[a]lthough a parent has a prima facie right to custody of his or her child, the foremost consideration in deciding whether to terminate parental rights is the child's best interests. Where clear and convincing evidence establishes that the termination of parental rights is in the child's best interests, that consideration outweighs the parent's prima facie right to custody of the child").

Williams v. Williams, 50 P.3d 194, 200 (N.M. Ct. App. 2002) (affirming an order of visitation, over the objection of the parents, based solely on statutory factors including the best-interest of the child with no apparent presumption in favor of the parents' decision; "We agree with Parents that, as a general proposition, *Troxel* does require courts to give special consideration to the wishes of parents, and appropriately so. However, we do not read *Troxel* as giving parents the ultimate veto on visitation in every instance. *Troxel* may have altered, but it did not eradicate, the kind of balancing process that normally occurs in visitation decisions").

State v. Wooden, 184 Or. App. 537 (Or. Ct. App. 2002) ("*Troxel* now establishes that the court must give significant weight to a fit custodial parent's decision").

Crafton v. Gibson, 752 N.E.2d 78, 92 (Ind. Ct. App. 2001) (affirming an earlier decision which used of "rational basis" scrutiny to evaluate a grandparent visitation statute because "the Supreme Court in *Troxel* did not articulate what standard would be applied in determining whether nonparental visitation statutes violate the fundamental rights of parents;" thus, "because the issue of what standard should be applied was not reached by the *Troxel* court, it is unnecessary for us to reevaluate the conclusions we reached in *Sightes* with regard to this issue").

Littlefield v. Forney Independent School Dist., 268 F.3d 275, 289 (5th Cir. 2001) ("The dispositive question at issue is whether the sweeping statements of the plurality opinion in *Troxel* regarding the "fundamental" "interest of parents in the care, custody, and control of their children," mandate a strict standard of scrutiny for the Parents' Fourteenth Amendment challenge to the Uniform Policy. We do not read *Troxel* to create a fundamental right for parents to control the clothing their children wear to public schools and, thus, instead follow almost eighty years of precedent analyzing parental rights in the context of public education under a rational-basis standard") (internal citations omitted).

Santi v. Santi, 633 N.W.2d 312, 317–18 (Iowa 2001) (holding that, under the Iowa Constitution, "the infringement on parental liberty interests implicated by the statute must be "narrowly tailored to serve a compelling state interest," *id.* at 318, even though "the *Troxel* plurality did not specify the appropriate level of scrutiny for statutes that infringe on the parent child relationship," *id.* at 317).

Jackson v. Tangreen, 18 P.3d 100, 106 (Ariz. Ct. App. 2000) (holding that "*Troxel* cannot stand for the proposition that [a state visitation statute] is necessarily subject to strict scrutiny" because "only Justice Thomas would have applied strict scrutiny to the statute in *Troxel*" and "[n]one of the other five opinions explicitly stated the level of scrutiny that it applied").

Mr. FRANKS. Professor Guggenheim, you are recognized for 5 minutes.

TESTIMONY OF MARTIN GUGGENHEIM, FIORELLO LaGUARDIA PROFESSOR OF CLINICAL LAW, NEW YORK UNIVERSITY SCHOOL OF LAW

Mr. GUGGENHEIM. Chairman Franks, Mr. Scott, Mr. King, Members of the Subcommittee, it is a great privilege for me to be here today. I am here testifying in opposition to a proposed constitutional amendment, recognizing the liberty of parents to direct the upbringing, education, and care of their children as a fundamental

right, not because I am, any less than my distinguished colleagues who are witnesses today, a fervent supporter of parental rights, I would out-elbow to the left and right for that label as someone who proudly regards himself as a fervent and staunch advocate for parental rights.

My disagreement is purely over means, not ends. But profoundly, I come before you with the straightforward, conservative message that we should never tinker with the Constitution lightly, that there is an overwhelming burden placed on anyone who suggests that we need to tinker with the Constitution, and that no careful student of the field could reasonably conclude that that burden is met in this situation.

The division of the court in *Troxel* is, in my opinion—and I am a great admirer of Michael Farris and the work that he does and the principles for which he stands—but I respectfully suggest that the critical disagreement among the Justices had less to do with the principle that we are discussing today, that is, the importance of parental rights. It had a lot to do with whether a Washington statute that was overbroad in its language should be declared facially unconstitutional or only unconstitutional as applied. It is a very complicated inquiry when a State court chooses to declare a law facially unconstitutional outside of the First Amendment and that case reaches the Supreme Court. And the scattered opinions spend much more time on that question than on the merits of what parental rights are.

Suffice it to say, that the Supreme Court of the United States has held fast to the principles supporting this amendment, the merits of them. Through every court from the Lochner era through the Roberts court, and it is useful to read the plurality's reaffirmation in 2000 of these principles. The court said that we have always confirmed that there is a constitutional dimension to the rights of parents to direct the upbringing of their children. We have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children. The history and culture of western civilization reflect the strong tradition of parental concern for the nurture and upbringing of their children. This primary role is now established beyond debate as an enduring American tradition. And, indeed, it is.

To suggest that we need Congress to come to the rescue, because the court has lost sight of this fundamental notion, I submit is wrong-headed and incorrect. It is a very odd idea to propose a constitutional amendment to place into the Constitution the exact language that the Supreme Court has upheld through five different courts from 1920 to 2000.

But there is more. We live in a country with overwhelming support for parental rights, as Chancellor Farris has just reminded us. Not only would it be unprecedented to amend the Constitution at a time when protected liberty, when the protected liberty involved is not threatened by the courts, but in our constitutional democracy it also matters whether the allegedly endangered group needs constitutional protection from the tyranny of the majority.

Parents constitute the overwhelming majority of Americans. In 2000, a national survey revealed that 86 percent of women and 84 percent of American men of voting age are or were parents. There

simply is no reason to believe that the values celebrated in this proposed amendment are not widely shared by Americans generally, and by voters in particular. Thus, there is neither a reason to worry that the courts or the legislatures are insufficiently sensitive to parental rights.

Would there ever reach the point that my distinguished colleagues here today suggest we have already, that there is really a threat to parental rights, we surely would have the means to address it at that time. But we aren't close to that at this point.

Mr. FRANKS. Thank you, Professor Guggenheim.

[The prepared statement of Mr. Guggenheim follows:]

House of Representatives Committee on the Judiciary

Subcommittee on the Constitution

Subcommittee Hearing on "H.J. Res. 110: Proposing an Amendment to the Constitution of the United States Relating to Parental Rights"

July 18, 2012

Testimony of Professor Martin Guggenheim

Fiorello LaGuardia Professor of Clinical Law

New York University School of Law

Mr. Chairman, distinguished members of the subcommittee:

I am testifying today in opposition to a constitutional amendment recognizing the liberty of parents to direct the upbringing, education, and care of their children as a fundamental right and forbidding States and the federal government from infringing on parental rights without demonstrating that the governmental's interest is of the highest order.

I will briefly note my background. I have been a member of the law faculty at New York University School of Law since 1973 and served as the Director of Clinical and Advocacy Programs from 1988 through 2002. My field of expertise is parental and children's rights. I have published five books and more than 40 law review articles and book chapters, the great majority of them focused on children's and parental rights. In 2005, I wrote WHAT'S WRONG WITH CHILDREN'S RIGHTS which was published by Harvard University Press. I have spent virtually all of my professional career litigating and writing about the rights of parents and children and particularly about the many dangers that are created when government is allowed to intrude too deeply into the private lives of families. I am known in the children's rights field, sometimes condescendingly, as a "parent's rights advocate." If a short-hand label must be given to everyone, I am quite comfortable being known as an advocate of parent's rights. I have vainly fought many legal battles in courts on behalf of parents whose rights have been undermined by state officials. I have testified before legislative committees advocating caution in the exercise of state power in this intimate area of the law. I am, in fact, in deep sympathy with the values expressed in this proposed Constitutional Amendment and have long admired and respected the work of Michael Farris.

I nonetheless come here today to testify in the strongest terms against this proposed Amendment. My opposition to this proposed Amendment is based on two grounds. First, there is no good reason to add specific language to the Constitution that protects parental rights because parental rights have been consistently and robustly protected by the Supreme Court of the United States over a very long course. Second, constitutional amendments should never be seriously considered unless there is a serious or pressing matter of public need justifying tinkering with the Constitution. That need is completely lacking in the United States today.

Let me briefly set forth the Supreme Court history concerning parental rights. The subject of "parental rights" has been profoundly shaped by the Constitution of the United States. Neither

the word "parent" nor "child," however, appears anywhere in the Constitution. Despite this, the Supreme Court of the United States has consistently and vigorously protected parental rights through the application of constitutional principles. Indeed, it has characterized the rights to conceive and to raise one's children as "essential," "basic civil rights of man," and "rights far more precious . . . than property rights."[1] The Court considers "the interest of parents in the care, custody, and control of their children" to be "perhaps the oldest of the fundamental liberty interests recognized by this Court."[2] In the Court's language, a parent's legal interest in his or her child is "established beyond debate as an enduring American tradition."[3] A wide range of explanations have been offered for the primacy of parental control in child rearing. Perhaps the most important is based on the relationship between citizen and state and the role of child rearing in developing and shaping the future generations of an informed citizenry.

Among the first principles of American law is that government exists to serve the will of the people. As a consequence, our special brand of constitutional democracy places significant limits on the power of government to regulate speech. A society committed to maintaining a government that serves the will of the people will find it necessary to strictly limit the circumstances under which government may constrain speech. Any other result leaves too great a danger that government will prevent speakers from saying what those in positions of power in government don't want to hear.

In addition, the less government is permitted to suppress speech the greater the range of ideas that can be expressed. An unregulated private marketplace of ideas, fosters pluralism in its best sense: free people are permitted to consider the widest range of possibilities about how to live their lives and to shape their society. Seen in these terms, free speech is basic to a society committed to democratic rule. It both restricts the government's capacity to silence speakers and forbids government from taking sides by preferring one idea over another.

A second fundamental tenet of American law that bears directly on the rules of parental rights is the extremely limited role assigned to government in the area of religion. The First Amendment guarantees to citizens the free exercise of religion; it also prohibits government from establishing a religion. As a result, government is obliged to allow religion to flourish and also is forbidden under the American Constitution from preferring one religion over another.

In a polity committed to the ideal of government serving the will of its people, it is unimaginable to conceive of children belonging to government. Quite the opposite. In such a polity, children must belong to the people for the theoretical political aspirations of self-control to have any meaningful chance to be realized. The best way to guard against government becoming too involved in shaping the ideas or religion of its citizens is to deregulate and privatize child rearing.

These principles mean that government must be sharply restricted in its capacity to oversee the circumstances under which children are being raised. Child rearing means forming the values, interests, ideas, and religious beliefs of the next generation. Unavoidably, it is a responsibility someone must undertake. Once the family is identified as the locus for this undertaking, we

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[1] Stanley v. Illinois, 405 U.S. 645, 651 (*quoting* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (*quoting* May v. Anderson, 345 U.S. 528, 533 (1953).
[2] Troxel v. Granville, 530 U.S. 57, 65 (2000).
[3] Wisconsin v. Yoder, 406 U.S. 205, 232 (1972).

should expect American law to insist, as the Supreme Court has, that there is a "private realm of family life which the state cannot enter."[4] This realm is beyond the state's reach, consistent with American constitutional democracy, because children's value inculcation and religious training is something "the state can neither supply nor hinder."[5]

It is useful to explore some particular cases decided by the Supreme Court that established these rules. The context of the disputes settled by the Court provides helpful insight into the broader questions under discussion. The first two cases ever decided by the Court exploring the subject of parental constitutional rights arguably remain the most important. In developing the principles supporting the rights of parents to raise their children free from undue state interference the Court stressed each of the issues we have already touched upon.

The first was decided in 1923; the second in 1925. These cases raised deeply profound questions about the relationship between the child, the parent and the state. In the first case, *Meyer v. Nebraska*,[6] the Court heard a challenge to a Nebraska law brought by a teacher of the German language. The Supreme Court declared the law unconstitutional because, among other reasons, it violated a parent's liberty interest protected by the Due Process Clauses of the Fifth and Fourteenth Amendments. To buttress this conclusion, the Court said that these provisions encompassed the rights "to marry, establish a home, and bring up children," even though none of them is mentioned in the Constitution itself.[7] Justice McReynolds, writing for the Court, reminded the reader that some societies were based on the understanding that the state was to play a primary childrearing role. Deliberately referencing an image anathema to many Americans, Justice McReynolds discussed Plato's vision of the Ideal Commonwealth which included that "no parent is to know his own child nor any child his parent." Instead, all children would be raised in barracks and their training and education would be left to "official guardians." About these ideas, he wrote:

> Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.[8]

Two years later, in a decision with even greater repercussions, in *Pierce v. Society of Sisters*,[9] the Court struck down an Oregon statute requiring children to attend public schools. The Justices found that this statute unduly interfered with the right of parents to select private or parochial schools for their children and that it lacked a reasonable relation to any purpose within the competency of the state.

The Court wrote:

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[4] Prince v. Massachusetts, 321 U.S. 158, 166 (1944).
[5] *Id.*
[6] 262 U.S. 390 (1923).
[7] *Id.* at 399.
[8] *Id.* at 402.
[9] 268 U.S. 510 (1925).

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children. . . . 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.[10]

These two cases have formed the foundation for constitutionally protected parental rights. Our future as a democracy depends on nurturing diversity of minds. The legal system's insistence on private ordering of familial life ultimately guards against state control of its citizens. To prevent standardization of youth, parents have constitutionally protected rights "to direct the education and upbringing of their children."[11] Accordingly, government must allow parents wide latitude to raise children as the parents wish to raise them. Even more basically, parents must be free to choose educators for their children who are unaffiliated with the state. Although the state may maintain a public school system for those parents who wish to send their children there, parents are free to use private education as an alternative.

The Court has also developed an important line of cases that protect a parent's right to keep or regain custody of their children. In a significant case decided in 1972, the Court heard an appeal by an unmarried father of three children whose custody was taken from him when their mother died. An Illinois statute automatically deprived unmarried fathers of the custody of their natural children on the death of the mother. Illinois defended the law on the grounds that, in most cases, the fathers of children born out of wedlock fail to maintain a significant presence in the children's lives.

In *Stanley v. Illinois*,[12] the father lived with his children and the mother for almost all of the children's lives. Nonetheless, Illinois claimed the power to take his children into the state's custody and provide the father with the right to come forward to show why returning custody of his children to him would further their best interests. The Court declared the law unconstitutional holding that unless a parent is unfit, he has the constitutional right to the care and custody of his children. In addition, the Court held the state is barred from short cutting its procedural obligations by presuming the father's unfitness. Most important of all, the Court made clear it is was irrelevant that Mr. Stanley might be able to regain his children's custody by showing their best interests would be furthered if he obtained custody. Illinois had a legitimate interest in the well-being of Mr. Stanley's children, the Court said, *only* if Mr. Stanley were found by a court to be unfit. Illinois had the lawful power to charge him with unfitness. But it was unconstitutional to require Mr. Stanley to prove that his children deserved to be with him before such a showing of unfitness had been made.

Most recently, in 2000, the Supreme Court decided the so-called "grandparents' visitation case," *Troxel v. Granville*.[13] *Troxel* involved a challenge to a Washington statute that authorized courts to hear petitions by non-parents (including, but not limited to, grandparents) who wished to be permitted visitation. In that case, paternal grandparents sought court-ordered visitation of their grandchildren after the children's father died. The Court ruled that the decision awarding

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[10] *Id.* at 535.
[11] Washington v. Glucksberg, 521 U.S. 702, 720 (1997).
[12] Stanley v. Illinois, 405 U.S. 645 (1972).
[13] 530 U.S. 57 (2000).

visitation to the grandparents over the mother's objection violated the mother's constitutional rights to control the details of her children's upbringing. Without declaring that petitions for visitation may never be brought or that courts may never award visitation over a parent's objection, the Court held that the Constitution required, at least, that courts give great weight to the reasons the parent opposes such visitation and overrule the parent's choice only in limited circumstances. Justice O'Connor's opinion, which announced the judgment of the Court, began with the observation that "[t]he liberty interest at issue in this case--the interest of parents in the care, custody, and control of their children--is perhaps the oldest of the fundamental liberty interests recognized by this Court," and that "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."[14]

The Court's reaffirmation of nearly a century's worth of Supreme Court caselaw as recently a mere 12 years agois worth repeating here:

> More than 75 years ago, in Meyer v. Nebraska, 262 U.S. 390 (1923), we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own." Two years later, in Pierce v. Society of Sisters, 268 U.S. 510, 534–535 (1925), we again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." We explained in Pierce that "[t]he 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." Id., at 535. We returned to the subject in Prince v. Massachusetts, 321 U.S. 158 (1944), and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Id., at 166.
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> In subsequent cases also, we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children. See, e.g., Stanley v. Illinois, 405 U.S. 645, 651 (1972) ("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements' " (citation omitted)); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); Quilloin v. Walcott, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected"); Parham v. J. R., 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization

[14] *Id.* at 65.

> concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course"); Santosky v. Kramer, 455 U.S. 745, 753 (1982) (discussing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"); Glucksberg, supra, at 720, ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the righ [t] ... to direct the education and upbringing of one's children" (citing Meyer and Pierce)). In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.[15]

This brief summary of the core Supreme Court cases supporting parental rights ought to be sufficient to demonstrate that parental rights are anything but at risk from being undermined by the Supreme Court – either now or at any time in American history. There are few constitutional protections that have received such similar support -- from the Supreme Court of the 1920s, an extremely conservative Court, through the Warren, Burger, Rehnquist and Roberts Courts.

But there is more. Not only would it be unprecedented to amend the Constitution at a time when the protected liberty involved is not threatened by the courts. In our constitutional democracy, it also matters whether the allegedly endangered group needs constitutional protection from the tyranny of the majority. Parents, however, constitute the overwhelming majority of Americans. Indeed, in 2000, a national survey revealed that 86 percent of women and 84 percent of American men of voting age are parents.[16] There simply is no reason to believe that the values celebrated in this proposed Amendment are not widely shared by Americans generally and by voters in particular. Thus, there is neither a reason to worry that the courts or the legislatures are insufficiently sensitive to parental rights.

Not counting the Bill of Rights, which was ratified in 1791 as part of the original pact leading to the Constitution, only 17 amendments have been added to it and none ever ratified constitutional decisions of the Supreme Court. To tinker with the Constitution when there is no genuine crisis or even a serious problem, would be an extraordinary act that could lead to unpredictable mischief in coming years.

Thank you very much.

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[15] *Id.* at 65-66.

[16] http://fatherhood.hhs.gov/charting02/introduction.htm#Who

Mr. FRANKS. Mr. Tozzi, you are recognized for 5 minutes.

TESTIMONY OF PIERO A. TOZZI, SENIOR LEGAL COUNSEL, ALLIANCE DEFENDING FREEDOM

Mr. TOZZI. Thank you. I would like to thank you, Chairman Franks, and the Subcommittee, for inviting me to testify in favor of the parental rights amendment.

Specifically, I have been asked to address the United Nations Convention on the Rights of the Child and how it would affect the rights of parents and impact the welfare of children.

I will begin by saying that the Convention is the most widely ratified treaty, bar none, and it is only the United States and Somalia that have not ratified it. But it is my position, nevertheless, that the Convention is fundamentally flawed, and despite the good intentions of many, it ultimately fails children.

The fundamental problem, as I see it, with the Convention, is that in pertinent part it envisions the child as an autonomous bearer of rights, divorced from his or her family, with the interventionist state seen as the ultimate guarantor of such rights, and such a perspective implicitly pits children against their parents.

Indeed, the Committee on the Rights of the Child, which is empowered under the Convention to receive reports of States' parties, has interpreted these rights as rights to be secured against parents, as opposed to civil and political rights to be secured against the State, and in fact, does invoke the State as against the parents.

Now while there are good provisions in the Convention, and it does mention the need to respect the responsibility, rights and duties of the parents, and does reference the importance of the family, there nevertheless is this internal tension with that of the child as the autonomous rights bearer. And I think this rights-based approach lends itself to thinking in dialectical terms with parents seen as oppressive and exploitative.

And much of the reason for this is because the Convention on the Rights of the Child grew out of thinking in the 1960's and 1970's which saw the child rights movement as part of a general liberationist movement. The writing of scholars such as Samantha Godwin, for example, and a recent article of hers titled "Children's Oppression, Rights and Liberation" where she links the child rights movement with prior liberation movements, I think is indicative of this approach.

And I think this problem is exacerbated by the role that the Committee on the Rights of the Child has taken under the Convention. The Convention says that Members of the committee shall be experts of high moral standing and recognized competence in the field covered by this Convention, which essentially means child rights experts. It is a self-selecting group, and it tends to be those people that would interpret the rights of the child as against parents.

Now this committee frequently issues directives that extend beyond its power, and opines as to matters that are not covered by the text of the Convention. For example, the committee has criticized the United Kingdom for laws that allowed parents to opt out their children out of sex education courses. It is on the grounds that excluding children, by parents excluding children, this

amounts to a denial of the child's right to express his or her views freely.

Likewise, the committee has instructed the government of Japan that they must guarantee the child's rights to privacy, "especially in the family."

Also, the committee has called for access to counseling on reproductive health services by children without the need for parental consent. They did this as recently as 2008 when Bulgaria and Georgia appeared before the committee.

These views undermine the parent, child, and the family bond; and ultimately, they harm children because they drive a wedge between parents as the children's natural protectors, and the children themselves. And in the worst case, it leads to calls for intervention by the State to enforce the rights of the child.

We have seen State actions, and I refer in my written remarks to cases from Sweden and Spain, where opposition to parents and taking children from their parents, home schooling parents, has been justified by reference to the Convention on the rights of the child.

Here in the United States, of course, we do have, as my colleagues have referenced, venerable Supreme Court precedents such as *Meyer v. Nebraska*, *Pierce v. Society of Sisters*, *Wisconsin v. Yoder*. However, I do disagree with my esteemed colleague here, we do see an erosion of parental rights. The case, for example, of *Parker v. Hurley*, which involved the parents' right to opt out of public school courses where materials that they deemed inappropriate and contrary to the moral values they were teaching their children was denied.

Now, the court there did not cite the reasoning of the committee on the Rights of the Child, but such reasoning does strengthen the arguments that advocates make. We have also seen elsewhere courts that have referenced the Convention on the rights of the child as being incorporated in customary international law.

I will conclude my remarks here, but I am certainly willing to address that further should you like. Thank you.

Mr. FRANKS. Well, thank you, Mr. Tozzi.

[The prepared statement of Mr. Tozzi follows:]

Congress of the United States

House of Representatives

Committee on the Judiciary

SUBCOMMITTEE ON THE CONSTITUTION

Hearing on a "Parental Rights Amendment"

July 18, 2012

Statement of Piero A. Tozzi

Senior Legal Counsel, Alliance Defending Freedom

Thank you for this invitation to address the Subcommittee on the Constitution on the important topic of "Restoring Parental Rights in the Constitution." Respect for parental rights is integral to the well-being of the family, which in the words of the Universal Declaration of Human Rights is "the fundamental group unit of society."[1] In particular, respect for parental rights is integral to the well-being of children, who thrive best in an intact nuclear family comprised of a biological father and biological mother.

Specifically, I have been asked to speak as to the United Nations Convention on the Rights of the Child (CRC), and how it affects the rights of parents and impacts the welfare of children.[2]

The CRC is the most widely ratified treaty bar none. Only the United States and Somalia have not ratified it.[3] It is my position that the CRC is a fundamentally flawed treaty, and one which, despite good intentions of many of its supporters and some beneficial provisions, ultimately fails those in whose interests it purports to protect: children.

Thus, United States' refusal to ratify the CRC and to conform to pressure that it do so is to be applauded, and not derided.[4]

The fundamental problem of the CRC is that, in pertinent part, it envisions the child as an autonomous bearer of "rights" divorced from his or her familial context, with an interventionist State seen as the "guarantor" of the child's rights. Such a perspective implicitly pits children against their parents and views them abstractly as disembodied beings remote from the context of the family, which is the social unit most protective of the child's interests and uniquely designed to promote the full and harmonious development of his or her personality.

This is not a hypothetical concern. As set forth in examples below, the United Nations Committee on the Rights of the Child (Committee) has repeatedly inveighed against parents, ostensibly on behalf of the "rights" of children, but in reality, by acting against parents and the family, advocating policies which if

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[1] UDHR art. 16(3).

[2] Convention on the Rights of the Child, G.A. Res. 44/25 U.N. GAOR, 44th Sess. Supp., No. 49, U.N. Doc. A/44/25 (Nov. 29, 1989).

[3] *See* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en

[4] Efforts to encourage ratification the CRC include those of The Campaign for U.S. Ratification of the Convention on the Rights of the Child. *See* http://www.childrightscampaign.org.

implemented would undermine the interests of children. In this they are joined by "child rights" activists and academics whose utopian policy prescriptions often likewise pay scant regard to the family, despite the family's recognized role as the "fundamental group unit of society" across cultures and across time.

While it should be pointed out that country recommendations and General Comments issued by the Committee have no binding "hard law" effect, they can be used by activists and attorneys to push policy prescriptions detrimental to parents and children – in other words, to the family.

The Text of the CRC

The notion of the child as an autonomous bearer of rights can be seen the following provisions:

- Article 13.1.: "The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice."[5]
- Article 15.1.: "States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly."[6]
- Article 16.1.: "No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his honor or reputation."

Perhaps my response is conditioned by the fact that I am the father of a teenager, but it seems self-evident how unworkable such absolute declarations of rights are in practice, and divorced from the ordinary functioning of family life and the normal interactions among parents and children.[7]

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[5] *Cf.* CRC art. 17 ("States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources…").

[6] While article 13 and 15 recognizes that the broad grant of rights may be subject to "certain restrictions," based upon the effect upon national security, public order, public health or public morals, these exceptions speak to general justifications for state restrictions on civil and political rights, as opposed to a parental carve out.

[7] The Convention defines a child as "a human being below the age of eighteen years." CRC art. 1.

While Article 13, with its broad grant of a right to "seek, receive and impart information and ideas of all kinds" via media of the child's choice was drafted before the advent of the internet, social media and phenomena such as "sexting," it should be obvious that responsible parenting requires vigilance in the matter of children's communications with the outside world and the use of media, including setting of conditions on the exercise of "rights" under this article.

Likewise, what does "freedom of association," framed as a civil and political right akin to that possessed as a general matter by all,[8] mean with respect to teenagers? The friends one's children associate with and who one's teenage children date, should be matters of concern to responsible parents and subject to parental restriction where appropriate.

Finally, the right of privacy, in particular with regard to correspondence, cannot be viewed in absolute terms, especially given the threat and temptation posed to young people by illicit drugs. While wise parents know to give a certain amount of increasing autonomy to their children as they advance in years, it is important that they also draw boundaries, and a concerned parent may at times discern a need to intervene with regards to a child's privacy.

While the Convention does direct States Parties to respect "the responsibilities, rights and duties of parents… to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention,"[9] as discussed further below, those charged with interpreting the CRC often take a more expansive view of the rights contained therein and seek to expand them even to the point where a conflict with parental authority is the result.

Philosophical Underpinnings of the CRC and the role of the State

While the CRC in a number of places, in particular the preamble, recognizes the fundamental importance of the family[10] and references the "best interests of the

[8] *See* Article 22. 1. of the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI) U.N. GAOR, 21st Ses., 1496th plen. Mtg., U.N. Doc. A/6316 (Dec. 16, 1966) ("Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.")

[9] CRC art. 5.

[10] The preamble, echoing the Universal Declaration of Human Rights of 1948 and the Declaration of the Rights of the Child of 1959, recognizes the family "as the fundamental group

child standard,"[11] such concerns are in tension with the view of the child as autonomous rights bearer.[12]

The older view, present in the non-binding Declaration on the Rights of the Child of 1959, sees the child as ideally existing in a familial context and, as a general matter, as dependent on others for securing his or her interests. Beginning in the 1960s and especially in the 1970s, activists began advocating a rights-based approach to secure the interests of the child. As Henry H. Foster, Jr., put it, "The same arguments that were advanced for and against the abolition of slavery and the emancipation of women recur when issues arise regarding the moral and legal rights of children."[13] Arising in academic writing, such arguments were also made in courtrooms as well,[14] and, as illustrated above, is a dominant theme in the Convention *on the Rights* of the Child.

Though today there are a number of academic critics of the rights-based approach as found in the CRC,[15] it is still the predominant view among many scholars and members of the Committee.[16]

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unit of society and the natural environment for the growth and well-being of all its members and particularly children," and that the child "for the full and harmonious development of his or her personality, should grow up in a family environment." CRC preamble. Declarations are statements of moral principle which are not legally binding in international law, whereas conventions (or treaties) are binding upon those states that have ratified them. Preambles of treaties are not binding per se, but do provide an interpretive context. *See* Vienna Convention on the Law of Treaties art.31(c) ("The context…shall comprise…the text, including its preamble and annexes.").

[11] *See* CRC art. 9(1)("States parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents…").

[12] *See* Bruce C. Hafen & Jonathan P. Hafen, Abandoning Children to their Autonomy: The United Nations Convention on the Rights of the Child, 27 Harv. Int'l L. J. 449, 451 (1993).

[13] Henry H. Foster, Jr., A 'Bill of Rights' For Children 6 (1977).

[14] Children "are autonomous individuals, entitled to the same rights and privileges before the law as adults." Hafen & Hafen, *supra*, *citing* Brief for State Respondent at 23, *In re Snyder,* 532 P. 2d 278 (Wash 1975).

[15] *See* Lynn M. Kohm, Suffer the Little Children: How the United Nations Convention on the Rights of the Child Has Not Supported Children, 22 N.Y. Int'l L. Rev. 57 (2009). Professor Kohm's article has been of particular benefit in the formulation of my thinking with respect to the tensions inherent in the CRC brought about by the child's rights approach.

[16] *See* James Dwyer, The Relationship Rights of Children 11 (2006) (focusing on individual autonomy and declaring that the same moral rights applicable to adults are also applicable to children).

This rights-based approach, however, lends itself to thinking in dialectical terms, whereby the rights possessed by children exist in tension with those who would deny them their rights, *i.e.,* their parents, who are perceived as a class against which children as a class must be able to assert rights instead of as the natural protectors of children. This is in part because the child-rights movement of the 1960s and 1970s arises from a liberationist narrative which adopted a dialectical perspective not only with regard to economic relations, which it viewed as inherently exploitative, but also with regard to social relationships as well.[17]

The continuing relevance of such a perspective can be seen in the writing of Samantha Godwin, for example, whose viewpoint is squarely summed up in the title of a forthcoming article to be published by the Northwestern Interdisciplinary Law Review, "Children's Oppression, Rights and Liberation." Godwin links the child rights movements with prior liberation movements, and finds that "despite all good intentions, society is institutionally oppressive to children while privileging adult wishes, desires and interests."[18] Per Godwin, "This oppression occurs without any maliciousness, quite the opposite, it is perpetrated out of concern for the best of children. Paternalistic appeals to the 'best interests' of the legal subordinates as a justification for that subordination is not unique to children. Similar arguments were advanced to justify the power of slave owners over slaves, and of husbands over wives."[19]

Under such a framework, the State then is seen as the guarantor of the rights of the child, to be appealed to secure the rights of children as against those who would deny them such rights, namely, parents.[20]

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[17] *See generally* Herbert Marcuse, An Essay on Liberation (1969).

[18] Samantha Godwin, Children's Oppression, Rights and Liberation, 4 Nw. Interdisc. L. Rev. 247, 252 (2011).Other academics have likewise argued that that children are "indoctrinated" by their parents when they are brought up in a particular religious tradition, and because they are not presented with a smorgasbord of different religions, their rights have been violated. *See* Joel Feinberg, "The Child's Right to an Open Future," *in* Aiken and LaFollette, (eds.), *Whose Child? Children's Rights, Parental Authority and State Power* (980); John White, *The Aims of Education Restated* (1982); and Hugh LaFollette, "Freedom of Religion and Children," *Public Affairs Quarterly* 1989 (3), 75-87. These views are criticized in Sylvie Langlaude, Children and Religion under Article 14 UNCRC: A Critical Analysis, 16 Int'l J. Child. Rts. 475, 479 (2008).

[19] Godwin, *supra* at 253.

[20] An example of this view can be seen in a Resolution adopted by the General Assembly in 2010 (A/RES/64/142) which calls, inter alia, for governments to create "Youth policies aiming at empowering youth to face positively the challenges of everyday life, including when they decide

While the State certainly has a role as guarantor of the welfare of children, including intervening in cases of abuse or neglect within the family context,[21] and the CRC rightfully acknowledges the police powers of States Parties to protect children from narcotics,[22] sexual exploitation[23] and trafficking,[24] there is also the danger of the State crowding out mediating institutions such as the family, churches and (non-public) schools.

For example, with respect to education, the CRC states that States Parties shall "Make primary education compulsory and available free to all."[25] While this in part echoes the Universal Declaration of Human Rights, what is noticeably missing is another (important) article from the Universal Declaration which declares that "Parents have a prior right to choose the kind of education to be given to their children."[26] (A "prior" right is *ipse facto* pre-political and grounded in nature, which the State does not grant but only can recognize.)[27]

Such an assertion of the positive power of the State with respect to education can interfere with the rights of parents, such as those who homeschool their children, and such an assertion of a State control over education is inconsistent with U.S. Supreme Court precedent which is solicitous of the parents right to control the upbringing of their children consistent with their moral values.[28]

The CRC does ameliorate this somewhat by noting that with respect to education, nothing "shall be construed so as to interfere with the liberty of

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to leave the parental home ..." Article 34 (c) of the Guidelines for the Alternative Care of Children, Annex to the Resolution.

[21] *See* CRC art. 9(1), cited above.

[22] "States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances." CRC art. 33.

[23] "States parties undertake to protect the child from all forms of sexual exploitation and sexual abuse." CRC art. 34.

[24] "States parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction, the sale of or traffic in children for any purpose or in any form." CRC art. 35.

[25] CRC art. 28(1)(a).

[26] UDHR art. 26(3).

[27] *Cf.* Aristotle, Nicomachean Ethics ("The love between husband and wife is evidently a natural feeling, for Nature has made man even more of a pairing than a political animal in so far as the family is an older and more fundamental thing than the state.")

[28] *See Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

individuals and bodies to establish and direct educational institutions," but this is to be "subject always...to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State."[29] This again not only ignores the rights of parents who homeschool their children, but also makes non-State education (such as provided by parochial schools) conditional on standards set by the State; as discussed below, when State-mandated standards include content that is morally objectionable to parents and non-State educational institutions, there is a potential for conflict between the State and mediating institutions, with the CRC weighing against such mediating institutions.

In sum, by CRC viewing children as solitary rights bearers with rights guaranteed by the State, and by favoring the State over mediating actors – in particular the family – the CRC unduly interferes with the rights of parents.

The Interpreters of the CRC

This implicit tension in the CRC between a rights-based approach and one which asserts that the best interests of the child should be the relevant standard wherein the family is the best guarantor of the well-being of children in most cases is exacerbated by the outsized role the CRC grants to the Committee.[30] The Committee is to be comprised of "experts of high moral standing and recognized competence in the field covered by this Convention."[31] This favors "experts" in the field of children's rights, who by self-selection, tend to be those who would interpret the "rights" of the child to be in tension with those of parents and the

[29] CRC art. 29(2).
[30] It should be noted that the CRC empowers the Committee to receive reports of States Parties and to request further information from States Parties. CRC art. 44. It does not give power to the Committee to issue legally binding opinions. The Committee has, however, taken it upon itself to issue reports on States Parties' compliance and interpretations of provisions of the CRC. Problems associated with such actions by treaty monitoring bodies, including the Rights of the Child Committee, are set forth in a submission made by the Alliance Defending Freedom, the Catholic Family and Human Rights Institute and Focus on the Family submitted to the Office of the High Commissioner for Human Rights in June 2012.
[31] CRC art. 43.2.

family, issuing directives that extend beyond its powers and to opine as to matters not covered by the text of the CRC.[32]

This can be seen in certain *ultra vires* statements by the Committee, such as its criticism in 1995 of a policy by the United Kingdom that empowered parents to remove their children from sex education courses on the ground that allowing parents to exclude their children from such classes amounted to denial of the child's right to express views freely.[33] Likewise, in 1998 the Committee improperly instructed the government of Japan to take steps to "guarantee the child's right to privacy, *especially in the family....*"[34] Such views undermine the parent-child and family bond, and ultimately harm children, as they drive a wedge between parent and child and disrupt family harmony. In the worse case, they lead to calls for the intervention by the State against parents in a ham-handed attempt to enforce "rights" of the child.

In addition to seeking to set standards on child sexuality education without the possibility for parents to opt out their children, the Committee has called for access to counseling and reproductive health services by children without the need for parental consent with references to confidentiality,[35] including abortion.[36]

The latter is extremely problematic, given that abortion is nowhere referenced in the CRC, and indeed, its text is consistent with protecting the unborn

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[32] For a compilation of acts that exceed the competency of the Committee, some of which are referenced in this Statement, *see* FamilyPolicy.ru, Ultra Vires Acts by the Committee on the Rights of the Child and the New Optional Protocol to the UNCRC, *available at* http://www.familypolicy.ru/rep/int-12-034en.pdf.

[33] Concluding observations on report by United Kingdom of Great Britain and Northern Ireland (1995, CRC/C/15/Add.34, para. 14), (citing article 12).

[34] Concluding observations on report by Japan, (1998, CRC/C/15/Add.90, para. 36) (emphasis added).

[35] See e.g. concluding observations on reports by Bulgaria (2008, CRC/C/BGR/CO/2, para. 48 (d)), and Georgia (2008, CRC/C/GEO/CO/3, para. 47-48)).

[36] Pressure for reviewing national legislation concerning abortion were contained in concluding observations on reports by Uruguay (2007, CRC/C/URY/CO/2, para. 51-52), Mozambique (2009, CRC/C/MOZ/CO/2, para. 64), Nigeria (2010, CRC/C/NGA/CO/3–4, para. 62 (e)), Burkina Faso (2010, CRC/C/BFA/CO/3-4, para. 57), Sri Lanka (2010, CRC/C/LKA/CO/3-4, para. 55), El Salvador (2010, CRC/C/SLV/CO/3-4, para. 61 (d)). Other UN treaty monitoring bodies have likewise suggested that prolife laws constitute a breach of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. *See* Concluding observations of the Committee against Torture for Ireland (CAT/C/IRL/CO/1) (June 17, 2011).

children.[37] Sates Parties to the CRC did not authorized Committee to interpret the text of the Convention. Therefore the Committee has no authority to interpret the CRC in ways that create new state obligations or that alter the substance of the rights contained in the treaty.

A further example of the Committee acting beyond its competence is its pressuring countries to consider new 'rights' and corresponding 'obligations' incorporated in a non-binding expert document *International Guidelines on HIV/AIDS and Human Rights*.[38] The purported obligations contained therein are not found in the CRC nor in any other treaty, and there is no established consensus behind them. Yet the "obligations" set forth in the *Guidelines* advocated by the Committee including amending abortion laws,[39] laws regulating same-sex relationships,[40] and laws regulating prostitution.[41] Yet the Committee, in its concluding observations, has repeatedly made this controversial document the basis for its recommendations to States Parties.[42]

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[37] *See* CRC preamble ("the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth"(citing Declaration of the Rights of the Child). On this point, *see* Piero A. Tozzi, International Law and the Right to Abortion, International Organizations Law Group, Legal Studies Series No. 1 (2010) at 7.

[38] E/CN.4/1997/37

[39] *International Guidelines on HIV/AIDS and Human Rights* (E/CN.4/1997/37) at 5 (f) (stating that "Laws should also be enacted to ensure women's reproductive and sexual rights, including the right of independent access to reproductive and STD health information and services ... including safe and legal abortion ...'

[40] Guideline 4 (b) and Guideline 5 (h) of the *International Guidelines on HIV/AIDS and Human Rights* (E/CN.4/1997/37) stating that 'Criminal law prohibiting sexual acts (including adultery, sodomy, fornication and commercial sexual encounters) between consenting adults in private should be reviewed, with the aim of repeal' (Guideline 4 (b)) and 'Anti-discrimination and protective laws should be enacted to reduce human rights violations against men having sex with men ... These measures should include providing penalties for vilification of people who engage in same-sex relationships, giving legal recognition to same-sex marriages and/or relationships and governing such relationships with consistent property, divorce and inheritance provisions. ... Laws and police practices relating to assaults against men who have sex with men should be reviewed to ensure that adequate legal protection is given in these situations' (Guideline 5 (h)).

[41] Guideline 4 (c) of the *International Guidelines on HIV/AIDS and Human Rights* (E/CN.4/1997/37) stating that 'With regard to adult sex work that involves no victimization, criminal law should be reviewed with the aim of decriminalizing ...'.

[42] Such references were made in concluding observations on reports by Uganda (2005, CRC/C/UGA/CO/2, para. 52), Mexico (2006, CRC/C/MEX/CO/3, para. 53), Benin (2006, CRC/C/BEN/CO/2, para. 58), Ethiopia (2006, CRC/C/ETH/CO/3, para. 56), Thailand (2006, CRC/C/THA/CO/2, para. 58), Lebanon (2006, CRC/C/LBN/CO/3, para. 60), Tanzania (2006, CRC/C/TZA/CO/2, para. 49).

The Committee does not explain how changing abortion laws to permit minors to obtain abortion without parental consent, undoing laws regulating same-sex relationships and legalizing prostitution can serve the best interests of children. Rather, this reflects a view of the child as the unencumbered rights bearer taken to the extreme of its logic.[43]

Abuses by State Actors Justified by Reference to the CRC

The above concerns are not merely abstract concerns, for the CRC has been invoked by State Actors – often, unelected bureaucrats or judges – in justifying actions that intrude upon the rights of parents or in justifying policies that undercut the role of parents as the primary educators of their children.[44]

One egregious example of the CRC being invoked to separate children from their parents due to majoritarian contempt for the non-conformist views of parents comes from Sweden, where child protective services removed a homeschooled child, Domenic Johansson, from his evangelical Christian parents.[45] This occurred despite homeschooling being legal in Sweden throughout the relevant time period

[43] Despite the Committee's rights-based activism, the institution has been ineffective in addressing global exploitation of children, such as curbing sex trafficking. *See* Kohm, *supra*; *see also* Marc D. Seitles, Effect of the Convention on the Rights of the Child Upon Street Children in Latin America: A Study of Brazil, Colombia, and Guatemala, 16 INT'L PUB. INT. 159, 159-60 (1997) (critiquing the CRC); *see also* U.N. Special Session on Children Draft Provisional Outcome Document, "A World Fit for Children," HUM. RTS. WATCH, Sept. 3, 2001, http://www.hrw.org/en/news/2001/09/03/un-special-session-children-draft-provisional-outcome-document-world-fit-children (stating that governments have to adopt appropriate goals to protect children's rights); *see also* Roy W. Brown, Representative, World Population Foundation, *Address Before the Human Rights Council, The Horror of Child Marriage* (Apr. 16, 2007), *available at* http://www.iheu.org/node/2553 (illustrating how the Convention on the Rights of the Child has many weaknesses). Even advocates of U.S. ratification of the convention appear ambivalent as to the Convention's effectiveness in protecting children. *See* Martin Guggenheim, Ratify the U.N. Convention on the Rights of the Child, But Don't Expect Any Miracles, 20 Emory Int'l L. Rev. 43 (2006).

[44] As noted above, the State has a legitimate role in intervening in cases of abuse or neglect, and the CRC references procedural safeguards in cases where parental custody is challenged.

[45] 13 August 2009, Länsrätten (County Administrative Court), Case No. 531-09 (upholding the decision of Swedish social services to continue the separation of the family), *aff'd*
27 January 2010, Regeringsrätten (Supreme Administrative Court), Case No. 45-10 (denying appeal). The facts from a perspective favorable to the parents are set forth at http://dominicjohansson.blogspot.com.

and the parents by all accounts being loving and caring.[46] Alliance Defending Freedom has represented the parents in corollary proceedings before the European Court of Human Rights, which in general has been more solicitous of the rights of parents.[47]

Another adverse decision concerning homeschooling arose in Spain, specifically with respect to standards with respect to sex education mandated by the previous government that parents found to conflict with their moral and religious beliefs. The State alleged a violation to the right to education protected by domestic legislation as well as the Convention on the Rights of the Child.[48] The Constitutional Court of Spain ruled that as schooling in Spain was mandatory, every child must conform to standards dictated by the Government, notwithstanding the objections of parents. This is comparable to the federal court decision in *Parker v. Hurley*, which held *inter alia* that parental objections to public school curriculum which they contend normalized offensive homosexual behavior were overruled by the state interests.[49]

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[46] Svensk författningssamling (1985:1100); 10 kap. Särskilda utbildningsformer, Home education has also been affirmed by Swedish case-law. *See e.g.* In the case of RÅ 1990 ref 111 (holding that a 7 year old child could be home educated in Sweden under the Swedish School Act). In subsequent proceedings in the Johansson case to terminate parental rights in favor of the current foster parents, the judge wrote a strong opinion denying the motion based on testimony as to the fitness of the parents from fact witnesses and experts. An application for an emergency order to reunite the family based on the findings that the family is fit and that parental rights were not terminated is currently *sub judice*.

[47] ECHR, *Johansson and Others v. Sweden* (application no. 27370/10). The European Court of Human Rights has elsewhere held: "It is in the discharge of a natural duty towards their children – parents being primarily responsible for the "education and teaching" of their children – that parents may require the State to respect their religious and philosophical convictions. Their right thus corresponds to a responsibility closely linked to the enjoyment and the exercise of the right to education." ECHR, *H v. United Kingdom* (judgment of 8 July 1987), Series A No. 120, pp. 59-63, § 84(e). The Court has also held that it is an interference of a very serious order to separate a family. Such a step must be supported by sufficiently sound and weighty considerations in the interests of the child; as the European Commission rightly observed, it is not enough that the child would be better off if placed in care. *Olsson v. Sweden*, (No 2) (1992) 17 EHRR 134, [1992] ECHR 13441/87, at 72.

[48] Judgment N, 133-2010, *available at* http://www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Sentencia.aspx?cod=10041. This also illustrates the limited scope of the ostensible protections afforded by CRC article 29(2), discussed above, which as written would require non-state schools to conform to standards such as those imposed by the former government of Jose Luis Rodriguez Zapatero.

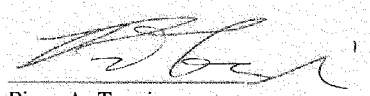
[49] 474 F. Supp.2d 261 (D. Mass. 2007), *aff'd* 514 F.3d 87, 102 (1st Cir. 2008).

Similar concerns have been raised by parents in Peru[50] and Colombia,[51] where the government has justified sexuality and citizenship programs with content similar to the Spanish curriculum by reference to, among other things, the Convention on the Rights of the Child.

Conclusion

In sum, children are often vulnerable and in need of special protection. Their interests are best served, in the usual course, by being raised in intact families, ideally by their biological mother and father, though special circumstances may make that not possible. The best protectors of children's rights are people who care about them the most – their mothers and fathers. The exclusion or downplaying of the rights of parents and support for the family – such as by elevating a misguided notion of "rights" such as contained in the Convention on the Rights of the Child over the best interest of the child – ultimately harms children rather than helping protect them.

Respectfully submitted,



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[50] Lineamientos para una educación sexual integral, abril, 2008, DIARIO OFICIAL [D. O.] (Peru).
[51] Programa Nacional de Educación para la Sexualidad y Construcción de la Ciudadanía, mayo 27, 2007, DIARIO OFICIAL [D.O.] (Colom.).

Mr. FRANKS. I recognize myself now for 5 minutes to begin questioning.

I will go ahead, if you will grant me diplomatic immunity, and in the interest of full disclosure, suggest that I believe a parental rights amendment of this sort is a vital addition to the Constitution. I think that the Constitution was always meant to recognize

these things, but it was never really memorialized in the text. And one of the things as the Chairman of the Constitution Subcommittee here, it is probably one of the greatest disappointments to me is the willingness of some courts to fundamentally ignore the clear written text and intent of the Constitution to come up with a wholly different conclusion or ruling.

And if they will do that with obvious language, my fear of what they might do at some point with no language whatsoever is one that nags at me given the magnitude and the importance.

In my opening statement, I suggested that if we look to the future, any country that looks to any future must realize that the things that they teach their children will have as profound an impact as anything that you can possibly imagine. So we will leave that decision in the hands of one of two people. It will be the State or the parents, in essential terms.

So I think the conclusion here is very significant. And in all deference to Professor Guggenheim, I think there is a moment in the life in every problem when it is big enough to be seen coming and still small enough to be addressed, and the Court's history here gives me a sense that clear language would be of some help in making sure that we don't step away from what the professor is absolutely right on, that this is something that all of us essentially agree on, that parents are the first decision makers.

With that, Mr. Tozzi, you made a strong argument against the U.N. CRC, and if we have not ratified that treaty—and again, this is a rhetorical question to give you an opportunity to expand you explanation—what is the big deal about it? What threat does it pose in terms of the Court's looking to "customary international law"? We have seen the Supreme Court begin to recognize customary international law as influential on domestic issues—*Roper v. Simmons* and *Graham v. Florida*, probably be good examples, but do you have an concerns that a parental rights case before the Supreme Court could be influenced by international law or treaties? And if so, what are your concerns and kind of give us your perspective?

Mr. TOZZI. Well, probably the most significant cases that did reference the Convention on the Rights of the Child you mentioned, *Roper v. Simmons* and the *Graham v. Florida*. In both those cases, the Convention on the Rights of the Child was cited as an example of world opinion, that norms had shifted and the United States was laggard. I believe the dissent of Justice Scalia in *Roper v. Simmons* addresses this, and some of the constitutional problems. He sees it really as a backdoor way for the courts to take a power that does not belong to them. The power to ratify a treaty does reside with the executive branch with the advice and consent of the Senate, not the judiciary. So there is that constitutional issue as well.

I just want to also state that I'm not here—the substance of the issue in *Roper*, for example, the juvenile death penalty, I'm not opining to that or speaking out in favor of the juvenile death penalty, but rather the constitutional issues.

Customary international law is usually referenced in cases involving the Alien Tort Claims Act. There is an expected decision by the Supreme Court in the next term, the *Kiobel v. Shell Oil* case, which will discuss the limits of customary international law.

Customary international law does have its place in our jurisprudence, but not an expansive notion that would incorporate everything. And there have been courts, a ninth circuit decision on the Tort Claims Act which has referenced universal declaration and other treaties as being part of customary international law.

Various courts have also referenced the Convention on the Rights of the Child as being incorporated in customary international law, including several in the eastern and southern district of New York.

Mr. FRANKS. Thank you, Mr. Tozzi, and I now recognize Mr. Scott for 5 minutes.

Mr. SCOTT. Thank you, Mr. Chairman.

Professor Guggenheim, does a treaty become binding law in the United States without implementing legislation?

Mr. GUGGENHEIM. I am not an expert. I don't want to give a definitive answer. Were we to formally ratify the Convention, it would be citable. It is not self-executing, but it would become material to use in courts. But there is a country-mile distinction between what happened in *Roper* and *Graham*, both Eighth Amendment cases where a critical inquiry is evolving standards. And the world's standards absolutely forbid, in plain language, the sentences that the States had imposed on those juveniles.

So the court naturally—but there is nothing like that.

Mr. SCOTT. But that is not binding on the United States?

Mr. GUGGENHEIM. Now it is not in any sense.

Mr. SCOTT. No treaty is binding in the United States without implementing legislation. I mean, the treaty itself does not self-execute, as you said. You need subsequent legislation to make it the law of the land.

One of the things that we are working on, and will need to inquire, is how the present law would change if we had the constitutional amendment. And under present law, is there any challenge to parental rights under current law when the parents are operating in the best interest of the child?

Mr. GUGGENHEIM. Under current law, there really are two different critical categories of parental rights. Education, deciding the details of your family's upbringing, are of course the major work of Chancellor Farris, and a very important example. But in addition to that, the two areas are intra-family arguments over access to children. That's what *Troxel* included.

Mr. SCOTT. If the parents are operating in the best interest of the child, is there any question that that would be—you don't need a constitutional amendment for that?

Mr. GUGGENHEIM. Of course not. Any time parents are acting in their children's best interest, the inquiry ends.

Mr. SCOTT. So if you have situations that are not in the best interests of the child, those are the kinds of situations that would be protected under our constitutional amendment; is that right?

Mr. GUGGENHEIM. The question would be is there an interest of the highest order to trump the parents' choice. The answer is, yes. It could mean that children's best interest would be not invoked because of a trumping principle.

Mr. SCOTT. Dr. Farris, how would this operate? If you are not operating in the best interest of the child, how would that affect medical decisions in terms of denying children access to reasonable

medical treatment because the parents do not want to have the child's best interests at heart?

Mr. FARRIS. Mr. Scott, the best interest standard is a dispositional standard in our law. It is not a jurisdictional standard. You have to first determine if the family has harmed the child, either abuse or neglect. And then you go to best interest standard. When we automatically start invoking the best interest standard, it is a subjective standard which means the government gets to say what it thinks is best for the child. I believe the government should not be able to invoke that dispositional standard until it has first proven the jurisdictional elements of abuse or neglect.

So you don't start with a sentencing standard or dispositional standard, you start with a jurisdictional standard. And what the government is doing in far too many cases, and mostly with people who don't have the ability to afford counsel, and they are not lucky enough to get somebody like Professor Guggenheim or me who basically does pro bono parents' rights' work, you can't get a dime between us in terms of what we think the law should be.

But the reality is, the lower courts and the agencies are running over parents on a daily basis.

Mr. SCOTT. But at some point, some parents are just incapable of operating in the best interest of the child, and if you give them total control, notwithstanding the unreasonableness of their action?

Mr. FARRIS. There is not doubt that at some point in time, parents abuse or neglect their children. When that happens, then the government gets to determine what it thinks is best for the children. But to use the best interest standard, the Washington State legislature put the best interest standard as the jurisdictional standard in the early 1980's. Under that, they had two cases. One went to the Supreme Court of Washington called In Re: Sheila Marie. And in that case, Sheila Marie was a 13-year-old-girl, was smoking marijuana, sleeping with her boyfriend. The parents grounded her, and the State took the girl away from her parents even though the court held that the rules were reasonable and the method of enforcing the rules were reasonable. Nonetheless, because there was conflict between parents and child over these standards, the State had jurisdiction and removed the girl.

That's what happens when you start with best interest. You don't start with best interest, you start with harm. After proof of harm, abuse or neglect, or divorce or something like that, after proof of brokenness, then you go to the best interest. If you start with best interest, that's the very problem because best interest necessarily means that the government gets to substitute its subjective judgment about what is right for the child over that of the parent.

Mr. SCOTT. Thank you.

Mr. FRANKS. Thank you, Mr. Scott.

I now recognize the distinguished gentleman from Iowa, Mr. King.

Mr. KING. Thank you, Mr. Chairman. I thank the witnesses. And I turn first to Dr. Farris.

What is the legal definition of a parent within the context of our discussion here?

Mr. FARRIS. Under the amendment, under the PRA, I think it would turn to State law to determine who is a parent under State

law. So it normally would be biological or adoptive parent, but that would be a State law question. Who is the parent of this child under State law?

Mr. KING. Do you all concur, the other witnesses? Professor Guggenheim and Mr. Tozzi?

Mr. GUGGENHEIM. Yes.

Mr. TOZZI. Yes.

Mr. KING. Thank you. So this complicates this understanding for me. If we have States that define parents as parents, legal guardians, that is what I would view as a definition of a parent under the law that I would like to see. If it gets expanded into grandparents, aunts, uncles, brothers, sisters and the whole or half blood, how does that affect this potential amendment to the Constitution, Dr. Farris?

Mr. FARRIS. First of all, constitutional amendments only affect disputes between the government and the parent. It won't affect any kind of intra-family litigation directly, except if there is a State law like the Washington State law. That wasn't just grandparent visitation, it was random third-party visitation in that State statute. But normally it is a dispute between the government and a person exercising parental authority under State law. So if the child was living with the grandparent under State law, that grandparent had parental authority, then the amendment would protect them.

Mr. KING. I'm thinking of this. I am thinking of parental notification laws in the event that a minor child would be seeking an abortion, and parental notification or parental consent laws and the definition of a parent within that context. And as I read this amendment that is the subject of this hearing today, and I would think that if the State grants an authority of consent to an aunt or an uncle of whole or half blood, that would intervene between this parental rights. So I don't know what effect this amendment would have if this amendment doesn't trump that kind of a State legislation decision to intervene.

Mr. FARRIS. In my opinion, Mr. King, if a State legislature gave the right or the power to perform parental notification in an abortion context, or really any context, to a nonparent, that statute would be subject to constitutional challenge. And if I was on the court, I guarantee you that the parent is going to win that case. But you would have to go through the test of is there a compelling governmental interest in doing so. In the abortion context, there is the countervailing fundamental right of the pregnant woman that's involved and it gets messy. This amendment would not settle any of those questions.

But a dispute between a randomly-named aunt and a parent, this amendment would speak to that and would uphold the superior right of a parent to be the one notified in any medical situation, absent proof of a governmental reason for intervention in taking that right away from the parent.

Mr. KING. I won't examine that question any further because I think you have posed the viewpoint of the breadth of question that I raised. But there is another question that occurs to me as I read the amendment. In a way, I am going to pose this to our Chairman as I prepare to yield to him. That is, it says that "this Article shall

not be construed to apply to a parental action or decision that would end life." And I would like to yield the balance of my time to Chairman Franks and ask him if he can help me answer that, and then do whatever you would like with the balance of my time, Mr. Chairman.

Mr. FRANKS. Thank you, Mr. King. I think we are going to go ahead and have a second round of questions here just for clarity, so I'm going to go ahead and do that. So you are welcome to finish your time out if you'd like.

Mr. KING. Would the gentleman yield to me?

Mr. FRANKS. Absolutely.

Mr. KING. Do you have a short answer to that particular question that I posed? The "Article shall not be construed to apply to a parental action or decision that would end life"? I'm happy to wait until the next round, if you would prefer.

Mr. FARRIS. Would you like me to answer? That language means that if the parents want to terminate the life of their child, some other source of law is going to have to answer the parental rights issues, and not this amendment. That was done as a result of concerns raised by National Right to Life. And so to satisfy those concerns, that language was drafted. Although it states a broader principle, if you want to kill your child, you are not going to be able to claim a parental right under this amendment. It restates in another way, I believe, the compelling interest test, that you don't have the right to terminate the life of your child. Whether you are going to starve them to death or lock them in a box, whatever. That is the broader principle stated by that subsection.

Mr. KING. Thank you, Dr. Farris. My time has expired and I yield it back. Thank you, Mr. Chairman.

Mr. FRANKS. Thank you, Mr. King. We will begin our second round of questions here. Oh, Mr. Conyers. I am so sorry, sir. Please forgive me. He just came in surreptitiously. I now recognize the distinguished Ranking Member of the full Committee, Mr. Conyers.

Mr. CONYERS. Chairman Franks, I apologize for coming in late. I appreciate being able to just ask a basic question of Attorney Piero Tozzi. What, sir, do you happen to think may be the weakest part of Professor Guggenheim's presentation about this subject of constitutionality in which he has posited that there is no need to tinker with the Constitution, and that there is no genuine crisis? How would you respond to that?

Mr. TOZZI. Well, thank you. I would like to say, first of all, that much of Professor Guggenheim's work I do admire, and there is a lot that we agree with each other on.

I think, however, that he has focused on certain cases and certain constellations in our constitutional system, but ignored certain trends. And I did reference the *Parker v. Hurley* case which involved the right of parents to opt their children out of public school curriculum where they disagreed as a matter of moral principle with the content. And I fear decisions in this vein, in particular, and I don't think that Professor Guggenheim adequately addressed that. But I do want to say that on many measures, we certainly do agree, and I'm an admirer of much of his work, although not all of it.

Mr. CONYERS. Thank you.

Dr. Michael Farris, what is your analysis in terms of the Guggenheim postulate that there really isn't much problem here that would warrant a constitutional amendment?

Mr. FARRIS. Professor Guggenheim and I are very much alike in a lot of ways. He teaches constitutional law at New York University Law School. I teach constitutional law at the Patrick Henry College. He litigates for parents; I litigate for parents.

Wearing our constitutional professor hats, we get into the discussions of what is the Supreme Court really doing? What's that court really thinking? Well, that's not the whole story. The litigator in me says I have got to face lower courts every day, and I have supplied the Committee 24 reported appellate decisions from State and Federal courts where they have interpreted *Troxel* the way I interpret it. So it's not a dispute between constitutional professors that matters, it is how is it really working in real life. And how it is working in real life unfortunately is the way that I say *Troxel* is. Both of us would like the same result. Both of us would like parents' rights to still be fundamental. Both of us would like there still to be a compelling interest test being used; but that's not what is happening in real life. So, for example, in the court of appeals——

Mr. CONYERS. Well, let me thank you for pointing that out, and I just want to turn to Professor Guggenheim for my remaining time to help us see what threads of similarity and unresolvable differences exist in this discussion, and I thank you very much, Dr. Farris.

Mr. GUGGENHEIM. Some of what I'm hearing creates a dilemma for me personally. If this were a hearing into the question, have we set something into motion that disserves families and children by permitting States to intervene too easily to remove children from their parents and families of origin, put me on the first list of witnesses to complain about what we are doing.

But if I may say respectfully, this Congress is a major agent in that Act. And if we were here to complain about the fact that the United States has the highest number of children in State-ordered foster care of any nation on Earth, mostly from poor families, overwhelmingly poor, impoverished families, and we asked should we do something about it, I would commend Congress to amend the child protection laws and explicitly say that no child should ever be removed from a parent's home except for reasons of the highest order.

We don't need a constitutional amendment, we need legislative change. If this distinguished body thinks there is a problem, we can fix it tomorrow by changing the legislation. We have that power. We don't need to pretend we need a special law to trump what we are doing. We can control our own actions. And I could stand before you if we want to turn this hearing into the question: Are we doing enough to ensure that children are raised by their families in the United States? I do not think we are. But I didn't understand that to be the question before us. The question before us is do we need a constitutional amendment to fix that problem? The answer, in my opinion, is no.

Mr. CONYERS. Thank you. I would like to thank Chairman Franks, and hope that this can be the subject in the future of a further consideration of this distinguished Committee.

Mr. FRANKS. Thank you, Mr. Conyers.

Dr. Farris, votes have been called, and I'm going to go ahead and start the second round. We will see how far we get. I will be as brief as possible.

I have already suggested to you that I think the absence of constitutional language to clarify this is at some point going to be an issue. I remain convinced of that not because I disagree with much of the very passionate and very well-stated testimony of Professor Guggenheim, but simply because I believe that there has been this trend of courts to begin to play the role of legislator, and at least this is a firewall in this regard. And in my mind, you have really identified the foundational issue here, and that is the best interest of the child.

In my testimony, once again, I said one of two people will answer that question, and it will be the State or the parents. And in my judgment, the parents are of such import in this case, this is one of the reasons that I think this amendment is, or some type of an amendment like this is important because it says in who decides the best interest of the child, we are going to give the clear advantage to the parents unless there is previously a proof of, or an indication of harm.

Mr. FRANKS. So with that, if I could ask you once again to sort of elaborate on this best interest of the child argument. And also, you said in your testimony that this thing should be a fundamental right. Can you give us some more examples from across the countries of what happens when parents when their rights are not considered fundamental.

Mr. FARRIS. Mr. Franks, I can take a few cases out of my own practice to explain. One is another Washington State case that focused exactly on the best interest standard. In that case, in Island County, Washington, a 13-year-old boy complained to a school guidance counselor who brought in a social worker, his family took him to church too much. They went to church Sunday morning, Sunday night, Wednesday night prayer meeting. And the social worker was outraged at that level of church. And under Washington State statute, that has since been repealed, the government can intervene for the best interest of the child without proof of harm.

They removed that boy on an emergency basis. I was at the hearing the following week to review that. And the judge said, I think this boy should go to church just once a week. That's what happens when the best interest standard becomes the sole issue. If you don't have the ability to say first you must prove harm, an interest of the highest order not otherwise served. If the government gets to make subjective judgment calls, you get judges deciding how often a kid goes to church. That's a parent's call, not a judge's call, not a social worker's call.

There was a case before the Court of Appeals of Michigan just last week. In that case, a family decided that after having surgery for their son to remove a tumor and a round of chemotherapy, that that was enough because the boy was testing clean of cancer. Their family doctor would continue PET scans, and the social services agencies hired a private lawyer because the prosecutor refused to prosecute the family, to prosecute the family for medical neglect be-

cause the family did something different than what the doctors wanted.

In that case the sole issue is, do parents get to decide or do the doctors and the social workers get to decide what is appropriate medical care? It is not a case where there's clear harm, it is a gray zone case. And we are seeing more and more of these cases where parents are losing their ability to make good parenting decisions and it is because the government thinks it gets to decide what is best for families. And they do so most often for poor families, for middle class families, for people who can't stand up for themselves. And the reason we need a constitutional amendment is because not every case gets before the Supreme Court. I want social workers who are dealing with the family to know there's a constitutional amendment here, where I am attacking this poor family, these people have real rights in black and white that I can't ignore. If we are just based on inferences and debates that the professors have, social workers don't pay attention to that. Social workers will pay attention to black and white constitutional rights. We need to do something for families if we are going to stop this erosion of parental rights.

Mr. FRANKS. Thank you, Dr. Farris, and I am going to end my questioning here by simply stating that once again, I think you have articulated it well, that who decides what is in the best interest of the child. Unless there is clear convincing evidence that the child is somehow being harmed, I think unless we are willing to just leave that to chance, that it is very important for us to pass an amendment like this making it clear that parents have the first and most fundamental right to decide the upbringing and education of their children.

Now we might also look into something regarding one of your cases to maybe get a judge to say that Members of Congress might attend church at least once a week, or something like that. It might be good for the country, I don't know. That is just something we can throw out there for consideration. With that, I would yield to Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman. Dr. Farris, is the case involving church attendance appealed?

Mr. FARRIS. No, it was not. The judge told the parents if you don't give your son or don't agree with my ruling today, I will remove your child. I could not assure the family they would keep custody while they appealed, and they jut simply caved in.

Mr. SCOTT. The problem is that is, if you have a bad decision, you don't go to constitutional amendments, if it was a bad decision.

Mr. FARRIS. No, Mr. Scott, that's true, but within a week or a month it was a very short period of time, it has been a while ago, I can't remember the exact sequence, the Supreme Court of Washington did issue the decision I referenced earlier in the same exact law In Re: Sheila Marie. And they held that the statute's ability to overturn parental decisions was constitutional. And so even though that particular fact pattern wasn't appealed, a very parallel fact pattern involving parents grounding a girl for smoking marijuana and sleeping with her boyfriend at age 13 was appealed and that one was lost at the Supreme Court of Washington level.

Mr. SCOTT. Well, my time is very limited. If you could give us examples of cases where the best interest of the child is—where the decision is in the best interest of the child, and the courts have done other than what the parents acting in the best interest of the child. In cases where the court has decided that they are not acting in the best interest of the child, exactly how this Constitutional amendment would change things. There's some limit to acting not in the best interest of the child, and I think you would want to protect the child from, and I think you are in a gray area. If you could help us out, I am not sure we can do that in the time we have left, but if you could help us on that, it would be helpful.

Mr. FARRIS. Mr. Scott, the I think Professor Guggenheim and I would agree on this exactly, the government's authority to intervene should require a prior showing of harm to the child, abuse or neglect.

Mr. SCOTT. Have cases been shown where the family's acting not in the best interest of the child, but the child was not harmed, harmless error?

Mr. FARRIS. Well, let's take the Nebraska case that would be illustrative of this—Douglas case? Yeah, where this lady turned her child over to social workers for a voluntary period because she was having problems with lactose intolerance and some of her own problems in her life. And the government took the child because they thought it was in the best interest of the child to take it and they terminated her parental rights. And the Court of Appeals in Nebraska said that you can terminate parental rights when the parent is not capable of doing what is best for the child. But the Supreme Court of Nebraska overturned that saying that's too flimsy a ground to terminate parental rights. That's what happened. Best interest is too flimsy a ground. We should not be able to take——

Mr. SCOTT. So the law in the land in that area is okay under present constitutional standards?

Mr. FARRIS. The Nebraska Supreme Court got it right.

Mr. SCOTT. The fact that you have a trial level court decision that isn't right, we have to go through a general standard, and the idea that you can find a case where a trial court didn't get it right is not the grounds for a constitutional amendment?

Mr. FARRIS. I have 24 appellate decisions reported attached to my testimony where the courts didn't get it right, 24. It is not one, it's not two.

Mr. SCOTT. Yeah, but the appellate court got it right.

Mr. FARRIS. No. In the Nebraska case, yes, that one was resolved correctly. But I can list for you 24 cases in my testimony, written testimony where the courts didn't get it right and the question is——

Mr. SCOTT. Where the appellate court did get it right?

Mr. FARRIS. No, did not get it right.

Mr. SCOTT. Okay.

Mr. FARRIS. The correct legal standard is this, are parental rights fundamental? That's the right standard, that's the right question.

Mr. SCOTT. That's kind of where we are going to try—that's going to be the gray area because if parents operating not in the best in-

terest of the child, at some point, the government ought to step in and protect the child.

Mr. FARRIS. No parent has the right to harm their child.

Mr. SCOTT. What would this amendment do on corporal punishment?

Mr. FARRIS. This amendment would continue the traditional law that moderate corporal punishment would be within a parent's authority. If they abuse the child, it would not protect them at all.

Mr. SCOTT. It would not change present law?

Mr. FARRIS. It would not change traditional law.

Mr. FRANKS. Thank you. Once again, you have emphasized who, when we are talking about best interest, is who decides best interest of the child and what does that encompass. And it is and a question of inexpressible gravity, and I want you to know that I appreciate all of you for being here today. Without objection, all Members will have 5 legislative days to submit to the Chair—I am sorry, surreptitiously again.

Mr. SCOTT. It is okay.

Mr. FRANKS. Submit to the Chair additional written questions for the witnesses which will be forwarded to them and they will be asked to respond as promptly as they can so their answers maybe made a part of the record. And without objection, all Members will have 5 legislative days within which to submit any additional materials for inclusion in the record. With that again, I sincerely thank the witnesses for joining us today, and the Members and observers and this hearing is now adjourned.

[Whereupon, at 1:42 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Material submitted by the Honorable Trent Franks, a Representative in Congress from the State of Arizona, and Chairman, Subcommittee on the Constitution

NANNIES IN BLUE BERETS:

UNDERSTANDING THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: A LEGAL ANALYSIS

MICHAEL P. FARRIS*

On November 20, 1989, an historic treaty proclaiming a world-wide regime of human rights for children was adopted and opened for ratification.[1] By September 2nd of the following year, the Convention on the Rights of the Child [hereinafter CRC] had been ratified by twenty nations, the number required for it to enter into force.[2] This means it became effective and binding on those nations.[3]

Currently, the CRC has been ratified by a total of 193 nations.[4] This makes it the most widely adopted human rights treaty of any kind.[5] Only two nations have not ratified or acceded to the CRC, the United States and Somalia.[6] Both the United States and Somalia have signed the CRC, but neither has received the necessary approval required by the internal law of the nation to become an official party

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1. United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

2. THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: A GUIDE TO THE "TRAVAUX PREPARATORIES" 633 (Sharon Detrick ed. 1992).

3. UNICEF, Path to the Convention on the Rights of the Child, http://www.unicef.org/crc/index_30197.html (last visited Feb. 20, 2010) [hereinafter UNICEF, Path to the Convention].

4. UNICEF, Child Rights—Related Conventions and Protocols, http://www.unicef.org/progressforchildren/2007n6/index_41852.htm (last visited Feb. 20, 2010).

5. UNICEF, Path to the Convention, *supra* note 3.

6. *Id.*

to the treaty.[7]

On February 16, 1995, Madeline Albright, then the United States Ambassador to the United Nations, signed the CRC on behalf of the United States.[8] Although the signing of the treaty was proclaimed a great victory by the then-First Lady Hillary Clinton,[9] President Clinton never sent the treaty to the Senate for ratification.[10]

It was important to employ the correct legal terminology of both American constitutional law and international law in the foregoing description of the status of this treaty. There are some key differences between domestic and international law—even in terminology. For example, if the United States Senate voted to approve the treaty by the requisite two-thirds majority, then United States constitutional law would refer to that as "ratification,"[11] but international law would call it "accession."[12] The goal in making this distinction is not to expound on the somewhat dry differences between ratification and accession but rather to point out that the CRC is not a mere statement of altruism or political philosophy but rather a legal instrument with potentially binding legal consequences.

Under the most basic rule of international law, every nation that becomes a party to a treaty is obligated to perform the duties that it assumes under the terms of the treaty.[13] Moreover, under the Vienna Convention on the Law of Treaties, every treaty is superior to all internal law—including the nation's constitution[14]—with one important exception, which will be discussed later.

The United States Constitution reflects a variant of this same theme. Article VI contains this clause:

> This Constitution, and the Laws of the United States which shall be

7. *Id.*

8. Michael Smith, *U.N. Treaty Might Weaken Families*, WASH. TIMES, Jan. 11, 2009, at M17.

9. John F. Harris, *U.S. to Sign U.N. Pact on Child's Rights*, WASH. POST, Feb. 11, 1995, at A3.

10. Smith, *supra* note 8.

11. U.S. CONST. art. II, § 2, cl. 2. *See also* M. Cherif Bassiouni, *Symposium: Reflections on the Ratification of the International Covenant on Civil and Political Rights by the United States Senate*, 42 DEPAUL L. REV. 1169, 1172 n.13 (1993).

12. UNITED NATIONS, UNITED NATIONS TREATY COLLECTION: TREATY REFERENCE GUIDE 6, 8 (1999) http://untreaty.un.org/English/guide.pdf.

13. Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

14. *Id.* arts. 27, 46.

> made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[15]

This clause clearly proclaims that treaties are superior to all state laws and state constitutions to the extent that the provisions of state law are in conflict with the rules contained in the treaty.

Virtually all law governing the parent-child relationship is state law, not federal law.[16] Thus, the supremacy of the CRC, a treaty, would supersede the vast majority of American law concerning children since the vast majority of American law regarding children is state law. The overriding supremacy of a treaty over state law can be directly inferred from the previously quoted constitutional provision.

A related question is whether the treaty would be superior to our federal Constitution and federal laws made by Congress. The United States Supreme Court has ruled that the Constitution itself is superior to a treaty with regard to our domestic law.[17] However, international law contains the opposite rule—treaties trump national constitutions.[18]

There is some debate over the issue of whether a treaty would prevail over an inconsistent act of Congress.[19] Based on United States case law, it is fair to conclude that treaties and federal statutes would likely be viewed of equal rank and, therefore, the most recent enactment would prevail. Under this view, new treaties trump old federal laws regarding United States domestic law.[20] Under international law, however, there is no doubt that a treaty trumps a conflicting federal statute.[21]

If the United States becomes a party to this treaty, then it will have both a legal and moral duty to implement and obey the provisions

15. U.S. CONST. art. VI.

16. LYNN D. WARDLE & LAURENCE C. NOLAN, FUNDAMENTAL PRINCIPLES OF FAMILY LAW 30 (2d ed. 2006).

17. Reid v. Covert, 354 U.S. 1, 18 (1957).

18. Vienna Convention, *supra* note 13, art. 27.

19. *See generally* Jonathon Turley, *Dualistic Values in the Age of International Legisprudence*, 44 HASTINGS L.J. 185, 186–90 (1993).

20. Medellin v. Texas, 552 U.S. 491, 509 (2008) ("[A] later-in-time federal statute supersedes inconsistent treaty provisions.") (citing Cook v. United States, 288 U.S. 102, 119–20 (1933)).

21. Vienna Convention, *supra* note 13, art. 27.

contained therein. The duty to comply with the treaty would fall on the national government.[22] Thus, Congress, not the states, would have the duty under international law to implement all provisions of the treaty.[23] These include regulations in the areas of education, health care, family discipline, the child's role in family decision-making, and a host of other subjects.

By ratifying this treaty, Congress would not only acquire the duty to implement the treaty, Congress would also acquire the jurisdiction necessary to directly legislate on education, health care, and family life.[24] Under current law, Congress cannot enact laws that directly govern these areas.[25] Generally speaking, if Congress wants to regulate something in one of these areas, it enacts federal funding for the states but conditions the receipt of the funds on the state's implementation of the prescribed federal guidelines.[26]

This would change if the CRC is ratified. For example, the treaty clearly bans all corporal punishment, including spanking by parents.[27] Currently, only the states can regulate corporal punishment.[28] But if the CRC were ratified, Congress would have both the power and the duty to implement legislation which directly imposes legal sanctions against parents who spank their children.[29]

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22. CRC, *supra* note 1, art. 4.

23. U.S. CONST. art. VI, cl. 2. *See also* CRC, *supra* note 1, art. 4.

24. *Id. See also* T. Alexander Aleinkoff, *Thinking Outside the Sovereignty Box: Transnational Law and the United States Constitution*, 82 TEX. L. REV. 1989, 1994 (2004).

25. *See* SANFORD N. KATZ, FAMILY LAW IN AMERICA 139 (2003); Don S. Browning, *The United Nations Convention on the Rights of the Child: Should it be Ratified and Why?*, 20 EMORY INT'L L. Rev. 157, 158 (2006) ("Family law in the United States is, for the most part, a constitutional responsibility of the fifty states.").

26. New York v. United States, 505 U.S. 144, 166–67 (1991) (quoting South Dakota v. Dole, 483 U.S. 203, 206–07 (1986)). *See also* Ryan C. Squire, *Effectuating Principles of Federalism: Reevaluating the Federal Spending Power as the Great Tenth Amendment Loophole*, 25 PEPP. L. REV. 869, 884 (1997–98) (discussing Congress' methods of influencing the implementation of state legislation that falls outside the scope of Congress' enumerated constitutional powers). *See also* KATZ, *supra* note 25.

27. CRC, *supra* note 1; Comm. On the Rights of the Child, *General Comment No. 8: The Right of the Child to the Protection from Corporal and Other Cruel or Degrading Forms of Punishment*, 3 U.N. Doc. CRC/C/GC/7 (Mar. 2, 2007) [hereinafter *General Comment No. 8*].

28. *See* Christopher B. Fuselier, *Corporal Punishment of Children: California's Attempt and Inevitable Failure to Ban Spanking in the Home*, 28 J. JUV. L. 82, 84–85 (2007) (citing David Orentlicher, *Spanking and Other Corporal Punishment of Children by Parents: Overvaluing Pain, Undervaluing Children*, 35 HOUS. L. REV. 147, 150–53 (1998)).

29. U.S. CONST. art. VI; Aleinkoff, *supra* note 24. *See also* Jason M. Fuller, *The Science and Statistics Behind Spanking Suggest that Laws Allowing Corporal Punishment are in the Best Interests of the Child*, 42 AKRON L. REV. 243, 256–57 (2009).

Additionally, though Congress would have the power to control corporal punishment, it would not have discretion to permit it. By ratifying the treaty, Congress would have a duty to ban all corporal punishment, including corporal punishment administered in the home.[30] The only discretion retained by Congress would be to specify the punishment to be meted out against parents who violated the provision of the treaty that bans spanking.[31]

This general introduction to the interplay of treaty law with United States domestic law should make it readily apparent that Congress ought to exercise the utmost caution in adopting any treaty. A thorough understanding of the meaning and application of a proposed treaty is essential to any decision regarding its ratification. Congress should not ratify (i.e. promise to obey) a treaty, if it is its intention to not obey or to only partially obey its provisions.

International law imposes a duty upon nations to fully implement the provisions of those treaties that they ratify.[32] Moral law imposes the same duty.[33] Thus, it would be foolish to ratify a treaty without carefully considering whether the substantive rules and policies contained in the treaty are superior to those made by the members of Congress.

Before considering the details of the CRC, it is important to examine one more piece of its background. The CRC is an international human rights treaty. Accordingly, a basic understanding of the scope of human rights treaties is necessary.

I. AN OVERVIEW OF THE SCOPE OF HUMAN RIGHTS LAW

Like most human rights treaties, the Convention on the Rights of the Child contains a codification of five groups of interdependent rights: political, civil, social, cultural, and economic.[34] Note the term "interdependent." The theory of human rights law is that if a child

30. *See* CRC, *supra* note 1; *General Comment No. 8*, *supra* note 27. *See also* Fuller, *supra* note 29.

31. U.S. CONST. art. I, § 8, cl. 10.

32. Vienna Convention, *supra* note 13.

33. *See, e.g.*, *Matthew* 5:37 ("Simply let your 'Yes' be 'Yes,' and your 'No,' 'No'; anything beyond this comes from the evil one.").

34. UNICEF, HUMAN RIGHTS FOR WOMEN AND CHILDREN: HOW UNICEF HELPS MAKE THEM A REALITY 1 (1999), http://www.unicef.org/publications/files/pub_humanrights_children_en.pdf.

does not have enough to eat (an economic right), of what value is education (a social right) or due process in a juvenile delinquency hearing (a civil right)?[35] Thus, economic rights, like the right to food, are guaranteed to children every bit as much as civil rights such as the right to due process.

The traditional American theory of rights—as represented by documents like The Bill of Rights—are guarantees of liberty that act as limitations on the power of government.[36] The government may not invade the freedom of speech, press, or religion.[37] Human rights theory embraces most of these kinds of rights but contains an entirely different sector of rights in addition to those mentioned.[38] In short, human rights theory guarantees the right to complete care by the state—not just to children, but to all persons.[39]

One law professor who embraces this approach to human rights law gives us a revealing description of the meaning of a related treaty:

> In essence, [the articles of the treaty] deal with the rights to food, clothing, and housing, the right of access to physical and mental health care, and the right to education. In terms of the "ratifiability" of the Covenants by the United States, the issues raised by that cluster of rights are twofold. Is the United States prepared to commit itself to the general proposition that there is indeed a human right to each of these social goods or, put differently, to the satisfaction of each of these basic human needs? And, even if it is, is it prepared to accept the specific level of obligation in that regard provided for by the Covenant?[40]

Geraldine Van Bueren, a human rights professor at the University of London and one of the drafters of the CRC, describes human rights law and children's rights in terms that are clearly socialistic.[41]

> International human rights law is a peaceful but powerful

35. *See* Katharine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 YALE J. INT'L L. 113, 128–34 (2008).

36. BERNARD SCHWARTZ, THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS 1 (1977).

37. U.S. CONST. amend. I.

38. *See generally* Universal Declaration of Human Rights, G.A. Res. 217A (III), at 75, U.N. GAOR, 183d plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948).

39. JACK DONNELLY, INTERNATIONAL HUMAN RIGHTS 154 55 (1998).

40. Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT'L L. 365, 369 (1990).

41. Geraldine Van Bueren, *Combating Child Poverty—Human Rights Approaches*, 21 HUM. RTS. Q. 680 (1999).

> instrument of change. In essence, human rights is about peacefully redistributing unequal power . . . . The essence of economic and social, and to an extent cultural, rights is that they involve redistribution, a task with which, despite the vision of human rights, most constitutional courts and regional and international tribunals are distinctively uncomfortable.[42]

However, Professor Van Bueren praises those courts willing to boldly implement social and economic provisions of human rights treaties:

> The combating of child poverty is a good place to begin, not only because of the near universal ratification of the United Nations Convention on the Rights of the Child (CRC) of 1989, which symbolizes an international commitment to tackle child poverty, but also because of the way international law has been utilized by some national courts to support judicial activism in protecting children's rights.[43]

Treaty obligations are traditionally categorized in terms of their priority in relation to implementation.[44] The highest treaty obligations are those which may not be derogated even in times of national emergency.[45] Professor Van Bueren states, "[I]n terms of treaty law, children's economic, social, and cultural rights are so fundamental that no derogations from the implementation of these rights are allowed, even in times of emergency which threaten the life of the nation."[46]

Professor Van Bueren comments on the acceptability of the CRC in the United States.[47] She describes the duty of the government to provide for the economic needs of children as being "to the maximum extent of available resources . . . regardless of the economic model followed by the State party."[48] She states that this duty:

> [I]s one of the reasons that the United States will find it difficult to become a party to the CRC; political philosophies that undermine

42. *Id.* at 680–81.

43. *Id.* at 681 (citing CRC, *supra* note 1; Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. T.S. No. 005 [hereinafter Convention on Human Rights]; GERALDINE VAN BUEREN, THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD (1998)) [hereinafter VAN BUEREN, INTERNATIONAL LAW].

44. Van Bueren, *Combating Child Poverty*, *supra* note 41, at 684.

45. *Id.* (citing CRC, *supra* note 1).

46. *Id.*

47. *Id.* at 692.

48. *Id.*

> social welfare on the basis of privacy are not acceptable. The CRC has shifted the focus from the historical benefits approach . . . to a child's right to an equitable share in the resources of the country. The CRC provides an ideology for state intervention.[49]

The Committee on the Rights of the Child provides official interpretations of the treaty in the reports it issues. These reports describe compliance by each state party.[50] If the Committee criticizes a nation's failure to comply with the CRC, this constitutes a tacit finding that the nation has violated international law.[51] Despite the fact that the Committee has no true enforcement power, it is an important source for learning what the treaty requires of a state party. Professor Van Bueren notes that in one of these reports, the United Nations Committee on the Rights of the Child, criticized Egypt and Indonesia on the proportion of their budget spent on defense, as compared to the proportion spent on children's social expenditure.[52] The Committee also criticized Austria,[53] Australia,[54] Denmark,[55] the United Kingdom,[56] and others failing to spend enough tax dollars on social welfare for children. Thus, it can reasonably be inferred that the CRC requires states to place greater importance on the social welfare of children than on national defense.

Remember that Professor Van Bueren commends those activist courts in various nations which have decided to directly order compliance with the CRC.[57] It is, then, reasonable to anticipate that children's rights activists would bring lawsuits in American federal courts in hopes of finding sympathetic judges who would hold that

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49. *Id.*

50. Anne F. Bayefsky, *The U.N. Human Rights Treaties: Facing the Implementation Crisis*, 15 WINDSOR Y.B. ACCESS TO JUST. 189, 191 (1996).

51. Vienna Convention, *supra* note 13, arts. 2, 11, 26.

52. Van Bueren, *Combating Child Poverty*, *supra* note 41, at 694, 705.

53. Comm. on the Rights of the Child, *Concluding Observations of the Comm. on the Rights of the Child: Austria*, ¶ 46, U.N. Doc. CRC/C/15/Add.251 (Mar. 31, 2005).

54. Comm. on the Rights of the Child, *Concluding Observations of the Comm. on the Rights of the Child: Australia*, ¶¶ 17–18, U.N. Doc. CRC/C/15/Add.268 (Oct. 20, 2005).

55. Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Denmark*, ¶¶ 18–19, U.N. Doc. CRC/C/DNK/CO/3 (Nov. 23, 2005).

56. Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Great Britain and Northern Ireland*, ¶ 10, U.N. Doc. CRC/C/15/Add.188 (Oct. 9, 2002).

57. Van Bueren, *Combating Child Poverty*, *supra* note 41, at 681 (citing CRC, *supra* note 1; Convention on Human Rights, *supra* note 43; VAN BUEREN, INTERNATIONAL LAW, *supra* note 43).

America spends too much on military defense and order a redistribution of funds toward children's social programs. Today, such a lawsuit would not likely prevail. No one can guarantee that the result would be the same in a decade or two.

So far, four basic principles have been established:

- The CRC is a treaty that creates binding legal obligations.
- The CRC is supreme over all state law.
- Domestic and international law differ on whether CRC overrides the United States Constitution.
- The CRC is a human rights treaty that imposes a socialistic duty on the government to furnish a child's economic, social, and cultural needs.

These points alone should plant doubts about the advisability of ratifying the CRC. Looking into the specific principles and rules contained in the CRC only confirms those doubts.

II. TWO CENTRAL PRINCIPLES OF THE CRC

The two most important principles of the CRC are the "best interests of the child" principle[58] and "the child's right of participation" in all relevant matters principle.[59]

Article 3(1) provides: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."[60]

Article 12(1) provides: "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."[61]

An example of how these principles are understood and

58. CRC, *supra* note 1, art. 3.

59. Barbara A. Atwood, *The Child's Voice in Custody Litigation: An Empirical Survey and Suggestions for Reform*, 21 ARIZ. L. REV. 629, 650 (2003) (citing CRC, *supra* note 1, art. 12).

60. CRC, *supra* note 1, art. 3.

61. *Id.* art. 12.

implemented is a case litigated by this author in Island County, Washington, in the early 1980s.[62] At the time, Washington State had a law on the books which allowed its juvenile courts to assume jurisdiction over a child on the sole grounds of conflict between a parent and child.[63]

A thirteen year-old boy in that county complained to the counselors in his public school that his parents took him to church more often than he desired. The parents attended church Sunday morning, Sunday evening, and Wednesday night. The boy was willing to attend church only on Sunday morning. This, of course, constituted a conflict between parent and child. Therefore, the school counselors turned the matter over to the Department of Social Services who immediately took custody of the boy and scheduled a hearing approximately three days later. The parents retained this author as their lawyer to contest this removal and to get their son back.

There was no suggestion of abuse or neglect of any kind. The sole issue was whether the child's wishes regarding the frequency of church attendance would be honored over the direction of the parents. Under traditional American law, this case would have never been filed or would have been immediately dismissed.[64] Absent proof of abuse or neglect, courts and social workers simply do not have the authority to intervene in parental decisions of this nature.[65] Under traditional standards, the government may not substitute its judgment for that of the parent until there is proof of abuse, neglect, or some other form of harm to the child.[66]

But under this new Washington law, the standards were different.[67] Without any finding of abuse or neglect, the trial judge ruled that the wishes of the child should be taken into account, and it was his view that the best interests of the child would be served if the boy was

62. As this was a juvenile case, citation information is unavailable to the public for privacy reasons.

63. WASH. REV. CODE § 13.32.040 (1978 & SUPP. 1978) (repealed 1979). *See generally* In re Sumey, 621 P.2d 108 (1980).

64. *See, e.g.*, In re Mead, 194 P. 807, 809 (1920).

65. *Id.*

66. *Id.*

67. WASH. REV. CODE § 13.32.040 (1977). *See* In re Sumey, 621 P. 2d 108, 109–10 (1980); In re Welfare of Becker, 553 P. 2d 1339, 1343 (1976) (stating that police and social workers have the right to take a child from his or her parents without any proof of abuse on the part of the parents).

allowed to limit his attendance at church to once a week. Accordingly, he ordered the parents to follow the boy's wishes or else the state would retain custody of the child.

This author wanted to appeal the case for the parents but could not guarantee them that they would retain custody of their son during the appeal. Accordingly, they decided to not appeal and obey the court's order so that they could regain custody of their son.

This case is an absolutely perfect example of what would be permissible if the United States adopted the CRC.

In two very important areas of parental choice—religion and education—it is absolutely clear that the CRC interferes with parental choice and elevates a child's wishes over that of the parent, at least as the child gets older.

The Committee on the Rights of the Child issued an official report on September 29, 2006, regarding Ireland that contains a number of relevant and troubling items:

> The Committee . . . notes that a high number of the complaints received by the Ombudsman for Children relate to a lack of respect for the views of the child. In light of Article 12 of the Convention, the Committee recommends that the State party . . . [s]trengthen its efforts to ensure, including through Constitutional provisions, that children have the right to express their views in all matters affecting them and to have those views given due weight, in particular in families, schools and other educational institutions, the health sector and in communities.[68]

In a more specific critique of the provisions for respecting the views of the child, the Committee made the following statement: "While noting that social, personal and health education is incorporated into the curricula of secondary schools, the Committee is concerned that adolescents have insufficient access to necessary information on reproductive health."[69] "The education is optional and parents can exempt their children."[70]

The CRC Committee clearly condemns the practice of states that permit parents to decide whether their child will participate in public school sex education. In the 1995 report on the United Kingdom's

68. Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Ireland*, ¶ 24, U.N. Doc. CRC/C/IRL/CO/2 (Sept. 29, 2006) [hereinafter *Concluding Observations: Ireland*].

69. *Id.* ¶¶ 52–53.

70. *Id.* ¶ 52.

compliance with the CRC, the nation was criticized for allowing parents to make decisions to remove their child from participation in sex education classes in government schools without adequate measures to ensure that the child's viewpoints were considered and weighed appropriately.[71]

It is noteworthy that no criticism was leveled against either Ireland or the UK for failing to consider the child's viewpoint in those cases where the parents allowed their child to attend the sex education classes.[72] Nor was there any criticism for failure to consider the child's views in the decision to enroll the child in the government schools in the first place.[73] The child's wishes seem to get special attention only when the parents want something different from the wishes of the government.

Professor Van Bueren explains the general approach of the CRC in this way. She notes that unlike earlier treaties, the CRC does not include a provision that allows parents to have their children educated in conformity with their parents' beliefs. She further argues that the child's right to freedom of expression and the right of the parents to initially give direction and later only guidance entitles children to participate in decisions and conform their education to their own convictions.[74]

> Does the child also have the right to choose his own religion? Under the CRC, parents do have the right to provide direction to the child. Such parental power, however, is subject to two restraints. First, such direction should take into account the evolving capacities of the child, as expressly required by the Convention. Second, the direction should not be so unyielding that it equals coercion.
>
> The right to freedom of religion in the Convention on the Rights of the Child includes Article 12 which gives the child the right to express his own views in the matter of choice of religion.[75]

71. Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: United Kingdom of Great Britain and Northern Ireland*, ¶ 14, U.N. Doc. CRC/C/15?Add.34 (Feb. 15, 1995) [hereinafter *Concluding Observations: UK & Northern Ireland*].

72. *Id.* ¶ 14; *Concluding Observations: Ireland*, *supra* note 68, ¶¶ 52–53.

73. *Concluding Observations: Ireland*, *supra* note 68, ¶¶ 58–63; *Concluding Observations: UK & Northern Ireland*, *supra* note 71, ¶ 32.

74. VAN BUEREN, INTERNATIONAL LAW, *supra* note 43, at 242–44.

75. *Id.* at 136–38, 156–59.

Insofar as Professor Van Bueren (who is acknowledged as one of the world's leading authorities on the CRC[76]) has an accurate understanding of this Convention, the result in Island County, Washington falls squarely in line with the requirements of this treaty. Under the CRC, social workers and courts have the power to decide whether they think a parent's decision about education or church is truly in the child's best interest, after giving the child's views whatever weight the government believes is appropriate.

When one looks at the actual application and enforcement of the CRC, it is neither parents nor children who make the final decision in the case of conflict—it is the state that has the power and duty under the CRC to make the ultimate decision on what the child's views are and whether those views are in the child's best interests.

III. HOW COULD THE CRC EVER BE RATIFIED?

Many of the details of the provisions of the CRC are relevant to this discussion and provide helpful reference points for understanding the real life impact of the CRC. A sampling of those details include:

- Spanking is banned, including in the home.[77]
- Children have a legally binding right to leisure.[78]
- Children have a right to reproductive health information without regard to parental involvement or permission.[79]
- It is illegal to sentence juvenile murderers to death.[80]
- It is illegal to sentence juvenile murderers to life in prison.[81]

However, while relevant, these details are not as important to understand as the two overarching principles just studied:

- Government can override parental decisions on the best interest of the child without proof of abuse, neglect, or

76. *Van Bueren Wins Children's Rights Award*, TIMES (London), Nov. 26, 2003, at 5.
77. CRC, *supra* note 1, art. 19(1).
78. *Id.* art. 31(1).
79. *Id.* art. 28(1)(a).
80. *Id.* art. 37(a).
81. *Id.*

harm.[82]

- Children have legally enforceable rights to complain about parental decision-making in every area of their life, including religious and educational decisions.[83]

Indeed, since the CRC gives the government broad power to override parents' decisions regarding the upbringing of their children, the details of the various provisions become somewhat superfluous—at least in light of the scope of this article.

Based on the foregoing discussion, it is fair to wonder how the proponents of the CRC hope to secure its passage. The short answer is that the proponents of the CRC plan to bluff. They make certain claims about the meaning and application of this treaty that are difficult to sustain in the face of a clear analysis. They appear to hope that no careful analysis of the domestic application of the CRC will be communicated to the Senate. Any criticism of the CRC is dismissively rejected as "uninformed" while CRC advocates appear to believe that they need not substantiate the legal validity of any of their assertions.

The website of the core group pushing for ratification of this treaty, the Children's Rights Campaign, has a page dedicated to answering criticisms of the CRC.[84] The website introduction reads as follows:

> Over 300 organizations representing the interests of the religious, education, health care, humanitarian, labor, legal, and social service communities have lent their support for ratification of the CRC. However, a small number of political organizations have spearheaded efforts to oppose United States ratification. These groups have sought to minimize the Convention's value by employing "scare tactics" to fallaciously portray the CRC as a threat to American families. In general, opponents largely base their arguments on unsubstantiated claims regarding national sovereignty and interference in the parent-child relationship.
>
> They allege that ratification of the CRC:
>
> - would endanger national and state sovereignty;

82. *See id.* art. 13.

83. *See generally id.* arts. 12–14.

84. The Campaign for U.S. Ratification of the Convention on the Rights of the Child, CRC FAQs—Myths and Facts, http://childrightscampaign.org/crcindex.php?sNav=getinformed_snav.php&sDat=faqs_dat.php (last visited Feb. 20, 2010) [hereinafter Campaign].

- would undermine parental authority by allowing the UN to dictate how parents raise and teach their children; and
- would enable children the right to do as they please, including taking legal action against their parents, having abortions, joining gangs, etc.

These false claims are the result of misconceptions, erroneous information, and a lack of understanding about how international human rights treaties are implemented in the United States.[85]

Notice the clever portrayal of organizations that support the treaty as religious, education, health care, and humanitarian organizations whereas those who oppose the treaty are characterized as political organizations. The National Education Association—together with its highly effective political action committee—is an educational organization.[86] The Home School Legal Defense Association is a political organization.[87] Perhaps, these simple clues reveal that the true nature of the website is closer to propaganda than to fair analysis.

Following this introduction, the Children's Rights Campaign announces that opponents have attempted to defeat the CRC using nine "myths."[88] Citing only a single source,[89] the Children's Rights Campaign claims that what it says is the truth while everything its critics say is myth, no matter how well supported.[90]

While the claim of the pro-CRC website might warrant a book-length refutation, the remainder of this article is devoted to analyzing and responding to a reasonable number of the website's central claims.

First, the Children's Rights Campaign website states that opponents of the treaty are wrong to state that ratification of the CRC would endanger national and state sovereignty[91] and that it is a myth that "[t]he Convention would become the 'Supreme Law' of the land."[92]

85. *Id.*

86. Nat'l Educ. Ass'n Legislative Action Ctr, http:// www.nea.org/home/Legislative ActionCenter.html (last visited Oct. 28, 2009).

87. Home School Legal Defense Association, Who We Are, http://www.hslda.org/about/ (last visited Oct. 28, 2009).

88. Campaign, *supra* note 84.

89. *Id.* (citing Reid v. Covert, 354 U.S. 1, 17 (1957)).

90. *Id.*

91. *Id.*

92. *Id.*

However, Article 27 of the Vienna Convention on the Law of Treaties clearly states that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[93] In addition, Article VI of the United States Constitution demonstrates that treaties prevail over state constitutions and state laws.[94] Thus, the claim that it is a "myth" that treaties will not affect state sovereignty or become the supreme law of the land are simply incorrect.

In support of the idea that the CRC would not interfere with national and state sovereignty the Children's Rights Campaign Website states "[a]s with any treaty, each U.S. state would be responsible for developing and executing its own legislation," and "[t]he Convention contains no language or directives with regard to how it should be implemented," thus making each country responsible for deciding what steps should be taken to implement the treaty. [95]

However, the Inter-Agency Standing Committee Reference Group on Humanitarian Action and Human Rights rejects such a proposition:

> Human rights law also contains provisions obliging states to implement its rules, whether immediately or progressively. States must adopt a variety of legislative, administrative, judicial and other measures that may be necessary to give effect to the rights provided for in the various treaties. This includes providing for a remedy before domestic courts for violations of specific rights and ensuring that the remedy is effective. The fact that a state has a federal or devolved system of government does not affect a state's obligation to implement human rights law.[96]

More specifically, Professor Van Bueren states the duties of governments ratifying the treaty as follows:

> Underpinning this approach are the legal consequences of states becoming party to the Convention on the Rights of the Child. The United Nations Convention on the Rights of the Child moves the

93. Vienna Convention, *supra* note 13, art. 2.

94. U.S. CONST. art. VI ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

95. Campaign, *supra* note 84.

96. Inter-Agency Standing Comm. Reference Group on Humanitarian Action and Human Rights, Frequently Asked Questions on International Humanitarian, Human Rights, and Refugee Law, http://www.icva.ch/doc00001023.html#24 (last visited Oct. 28, 2009).

> borders for the state of what is political and what can be subject to a legal challenge in courts, particularly in resource allocation and budgetary matters. The Convention and other international laws in effect narrows what were previously unfettered discretionary powers of governments. Before governments become party to human rights treaty they are obliged to ensure that there are the resources, either to implement the Convention on becoming party or shortly thereafter, in accordance with international law. **Hence, there is no interference with national sovereignty, the nationally sovereign decisions on how resources on children's rights to be expended have already been taken. In essence, the government has exercised its political powers, and it has to live with the legal consequences.**[97]

Thus, based on the writing of a proponent and authority on the Convention, full state discretion ends when the CRC is ratified. To the same point, the Children's Rights Campaign Website acknowledges the potential legal consequences of ratifying the treaty with reservations:

> The U.S. can ratify the CRC with reservations, understandings and declarations (RUDs). RUDs address specific conflicts between the U.S. Constitution and a particular Convention. Reservations modify a treaty's provisions (e.g., if a provision of the CRC is in conflict with the U.S. Constitution, the U.S. can file a "reservation" to the provision, so that the provision does not apply). Understandings and Declarations help to clarify how the U.S. believes a particular provision should be interpreted. RUDs do not legally exempt the U.S. from adhering to a provision.[98]

This is a curious "truth." On the one hand the website claims that "reservations modify a treaty's provisions."[99] On the other hand it says that "RUDs do not legally exempt the United States from adhering to a provision."[100] According to this logic the United States would still have to obey the treaty regardless of the reservations, understandings, or declarations. This is a clear contradiction.

In any event, both the text of the CRC and the Vienna Convention on the Law of Treaties are very clear about permissible and impermissible reservations. For example, the United Nations

97. Geraldine Van Bueren, *International Rights of the Child, Section D*, University of London 36 (2006) (emphasis added).

98. Campaign, *supra* note 84.

99. *Id.*

100. *Id.*

Convention on the Rights of the Child, Article 51(2) states that "[a] reservation incompatible with the object and purpose of the present Convention shall not be permitted."[101] Likewise, the Vienna Convention on the Law of Treaties, Article 19 Formulation of Reservations provides that "[a] State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless . . . the reservation is incompatible with the object and purpose of the treaty."[102]

Additionally, Professor Louis Henkin writes in the American Journal of International Law:

> Reservations designed to reject any obligation to rise above existing law and practice are of dubious propriety: if states generally entered such reservations, the convention would be futile. The object and purpose of the human rights conventions, it would seem, are to promote respect for human rights by having countries—mutually—assume legal obligations to respect and ensure recognized rights in accordance with international standards. Even friends of the United States have objected that its reservations are incompatible with that object and purpose and are therefore invalid.
>
> By adhering to human rights conventions subject to these reservations, the United States, it is charged, is pretending to assume international obligations but in fact is undertaking nothing.[103]

The Children's Rights Campaign website goes on to assert that the CRC is not a "self-executing treaty," or in other words, it "cannot be automatically implemented without legislative action."[104]

This is, however, not entirely accurate. Professor Arlene Andrews, Director of the Division of Family Policy at the University of South Carolina, writes that "[t]he Convention is generally regarded as having two classes of rights for the purposes of self-execution, one class that is self-executing and one that is not self-executing."[105]

101. CRC, *supra* note 1, art. 51(2).

102. Vienna Convention, *supra* note 13, art. 19.

103. Louis Henkin, Editorial Comment, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L LAW 341, 343–44 (1995).

104. Campaign, *supra* note 84.

105. Robin Kimbrough, *Entitlement to "Adequacy": Application of Article 27 to U.S. Law*, *in* IMPLEMENTING THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD: A STANDARD OF LIVING ADEQUATE FOR DEVELOPMENT 167, 171 (Arlene Bowers Andrews & Natalie Hevener Kaufman eds., 1990).

Thus, on the whole, the idea that ratification of the CRC will not interfere with national and state sovereignty, or that the United States can qualify its ratification of the CRC through RUDs is not sustainable in the face of good research and clear analysis.

Second, the Children's Rights Campaign website claims as myth that "[t]he CRC undermines the primacy of the parent-child relationship."[106] Again, the words of one of the CRC's strongest proponents prove this statement to be false. Professor Van Bueren writes:

> Best interests provides decision and policy makers with the authority to substitute their own decisions for either the child's or the parents', providing it is based on considerations of the best interests of the child. Thus, the Convention challenges the concept that family life is always in the best interests of children and that parents are always capable of deciding what is best for children.[107]

Professor Van Bueren further asserts that:

> State parties are obliged to 'assure' to children who are capable of forming views the rights to express those views 'in all matters affecting the child' and to give those views' due weight in accordance with the age and maturity of the child'. By incorporating a reference to 'all matters affecting the child' there is no longer a traditional area of exclusive parental or family decision making.[108]
>
> International law is therefore establishing boundaries within which states are under a duty to ensure that parental power is properly exercised and within limits . . . . The international protection of children's civil rights now touches the core of family life.[109]

Furthermore, several official reports by the CRC Committee reveal that the proper operation of the treaty will radically change parent-child relationships. For example, the United Nations Committee on the Rights of the Child, Official Report on Jordan (2006) states the following:

> [T]he Committee continues to be concerned that respect for the views of the child remains limited owing to traditional societal attitudes towards children within the family and the community at large.

106. Campaign, *supra* note 84.

107. VAN BUEREN, INTERNATIONAL LAW, *supra* note 43, at 46.

108. *Id.* at 137 (quoting CRC, *supra* note 1, art. 12.).

109. *Id.* at 73.

> In the light of Article 12 of the Convention, the Committee recommends that the State party continue to promote and facilitate, within the family, schools and other institutions, in courts and communities, respect for the views of children and their participation in all matters affecting them . . . .[110]

Another example is provided by the United Nations Committee on the Rights of the Child, Official Report on Ireland (2006) which states: "[T]he Committee is deeply concerned that corporal punishment within the family is still not prohibited by law . . . . The Committee . . . urges the State party to: a) Explicitly prohibit all forms of corporal punishment in the family; b) Sensitize and educate parents and the general public about the unacceptability of corporal punishment."[111] Parents need government re-education if the CRC is to be successful.

The Children's Rights Campaign website also asserts as myth the related idea that "[r]atification would allow the UN to dictate how parents should raise their children,"[112] and claims that "[u]nder the Convention, parental responsibility is protected from government interference."[113] Particularly, the website states that "[r]atification of the Convention would not prevent parents from homeschooling their children."[114] Once again, Professor Van Bueren's own words contradict these assertions:

> In contrast with other international treaties, the Children's Convention does not contain a provision establishing the right of parents to have their children educated in conformity with the parents' convictions . . . . Specifically, Articles 5, 12, 14, and 28 strengthen the argument that children living in states parties to the Children's Convention have the right to participate in decisions to ensure that their education is in conformity with their religious and moral convictions.[115]

Van Buren further states that "the Children's Convention potentially protects the rights of the child who philosophically

110. Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Jordan*, ¶¶ 40–41, U.N. Doc. CRC/C/JOR/CO/3 (Sept. 29, 2006).

111. *Concluding Observations: Ireland*, *supra* note 68, ¶¶ 39–40.

112. Campaign, *supra* note 84.

113. *Id.*

114. *Id.*

115. Geraldine Van Bueren, *The International Protection of Family Members' Rights as the 21st Century Approaches*, 17 HUM. RTS. Q. 732, 744–45 (1995).

disagrees with the parents' educational goals."[116] Impliedly, this means that if the child disagrees with the parents' educational choices for the child, the State will step in to facilitate the desires of the child. As stated before, the State looks to two criteria to determine when parental decisions are acceptable. First, the parents must take into account the evolving capacities of the child, and second, the parents' direction must not amount to "coercion."[117]

Thus, the State will step in if it makes the determination that either the parents are not taking into account the evolving capacities of the child—a very amorphous standard—or that the child is being "coerced" by its parents—a term for which the Convention does not provide a definition, presumably because it is left to the discretion of the State to determine the meaning of "coercion."

Third, the Children's Rights Campaign website claims as myth the view that "[t]he CRC embraces the view that children are autonomous agents who are capable, in all areas, of making adult decisions and dealing with adult situations."[118] It asserts instead that "[t]he Convention does not extend to children all of the same rights accorded to adults, such as the right to vote and unrestricted freedom to make independent decisions" and asserts:

> The framers of the CRC understood that children's ability to exercise certain rights is dependent upon their age and maturity and influenced by their culture, environment, and life experiences. The Convention encourages parents to deal with rights issues with their children "in a manner consistent with the evolving capacities of the child."[119]

If the earlier statement that parents would not be allowed to "coerce" their children in any way is not enough to refute this claim, Professor Van Bueren's statements supply any deficiency:

> **[S]tates** should take account of the evolving capacities of each individual child. This is underlined by the duty in the Convention on the Rights of the Child . . . under which *States Parties are* ***obliged*** to assure to all children capable of expressing views **the right to express views** in all matters affecting the child, **the child's views being given due weight in accordance with the**

116. *Id.* at 745.

117. *See* VAN BUEREN, INTERNATIONAL LAW, *supra* note 43, at 158.

118. Campaign, *supra* note 84.

119. *Id.* (quoting CRC, *supra* note 1, arts. 5, 14).

child's age and maturity.[120]

Presumably under this analysis, any child that is found by the state to have the maturity level of an adult will have his views given weight accordingly.

One area that is generally considered to be in the "adult" realm of decision-making is that of sexual expression. The developing trend under the CRC expands children's rights to include those traditionally afforded adults and allows children to make "adult" decisions.

> One aspect of the right to freedom of expression which, on the whole has been untested before international and regional human rights fora is whether the right to freedom of expression includes the right to sexual expression. If children have the right to freedom of expression and their right to freedom of expression is *similar to adults* the next question must be whether the right incorporates physical acts. Sexual acts as forms of expression are comparable in many respects to the case of symbolic speech . . . .
>
> It is, however, difficult to sustain the argument that the right of children to express themselves to either heterosexual or homosexual relations is of little interest to the public. Certainly some forms of public sexual activities are arguably included within freedom of expression.[121]

This quote notes that at least some forms of sexual activities are acceptable for children (those with rights under the CRC). Thus, it can be inferred that the CRC encourages allowing children to make "adult" decisions that they could not make until now.

Fourth, the Children's Rights Campaign website states it is a "myth" to contend that "[t]he Convention gives children the right to sue their parents."[122] Once again, the truth about this issue is supplied by Professor Van Bueren, who writes:

> International law grants an individual rights and duties which are capable of being enforced directly in the national courts but both the extent and manner of the implementation is generally determined by the national law of each country. A state, however, cannot plead provisions of its national law as authority for committing a violation of international law.[123]

120. VAN BUEREN, INTERNATIONAL LAW, *supra* note 43, at 75 (emphasis added).

121. *Id.* at 139–140 (emphasis added).

122. Campaign, *supra* note 84.

123. Van Bueren, *Combating Child Poverty*, *supra* note 41, at 681.

This clearly states that those individuals subject to international law have the right to enforce those laws in their national courts, contrary national laws notwithstanding. Because the CRC is an international treaty, children subject to the CRC would have the right to enforce its provisions in the courts of their citizenship, regardless of that nation's law.

Linda Elrod, Washburn University School of Law Professor and past Chair of the American Bar Association Family Law Section, supports this interpretation as well:

> Ratification of the Convention itself would be a major step forward in improving the laws that protect and secure rights for children. The CRC obligates its parties to draft legislation and programs to protect children, to create procedures assuring fairness in removing children from their homes, and to assure that the child's voice is heard. Article 12 makes the ability of a child to express his or her views an internationally recognized human right which could be regarded as customary international law. It is time to move beyond the political and economic arguments that have kept Congress from ratifying the CRC and give children full rights of citizenship.
>
> The interests of the child should be at the center of any decision-making. If the child is capable of articulating a perspective, the child should have client-directed counsel to get that voice before the court and the court should seriously consider it. Even if the child is unable to articulate a view, the child's attorney can offer a child-focused assessment of the child's needs. Because the child's best interests may be different than one or both of the parent's interests, the child should have a voice. Giving the child a voice, however, does not necessarily "conflict." Listening to the child does not mean not listening to the parents or others involved in the dispute. The key is to add the child's voice to the voice of others being presented.[124]

It does not matter whether a child has the capacity to file some form of civil action directly against his or her parents. A child can complain to a social worker or other official. Such officials have the authority to file actions challenging the decisions of the parents. A guardian *ad litem* is appointed to represent the child. And, if ratified, the CRC would be the substantive law which would control the outcome of such a challenge. It is child versus parent in substance if slightly disguised in form.

124. Linda D. Elrod, *Client-Directed Lawyers for Children: It is the "Right" Thing to Do*, 27 PACE L. REV. 869, 882–83, 894 (Summer 2007).

Fifth, the Children's Rights Campaign website asserts as myth the idea that "[r]atification will encourage children to have abortions."[125] Katie Hatziavramidis clearly asserts the opposite hope with regard to ratification of the CRC:

> The unmistakable trend in the United States is to consistently increase anti-choice legislation, particularly with respect to minors. Ratification of the U.N. Convention on the Rights of the Child by the United States holds a strong possibility of assisting minors who seek abortions without parental interference. The Convention may offer the best hope for securing adolescent reproductive freedoms on a global level. If enough diplomatic pressure were exerted on the United States to compel it to ratify the treaty, the CRC could provide significant improvements in the outlook for reproductive freedom for minors.[126]

Other nations that have ratified the CRC have been respectively approved or criticized by the United Nations Committee on the Rights of the Child for encouraging or discouraging abortion through national laws. For instance, the official report on Columbia in 2006 states that "[t]he Committee notes with appreciation . . . decisions of the Constitutional Court on . . . the partial decriminalization of abortion."[127] But, in the official report on Chile in 2006, the Committee commented that it "[was] concerned over the high rate of teenage pregnancies[] [and] the criminalization of the termination of pregnancies in all circumstances."[128]

These excerpts present a very different view from that claimed by the website. Based on ratification in other countries and the review of subsequent implementation, it appears that parties to the CRC will be encouraged to permit children to have abortions at will, subject only to the State's opinion on whether it is in the best interests of the child.

Sixth, the Children's Rights Campaign website claims as myth that the CRC allows children to participate in any religion of their choosing.[129] At least one country that ratified the CRC seems to

125. Campaign, *supra* note 84.

126. Katie Hatziavramidis, *Parental Involvement Laws for Abortion in the United States and the United Nations Conventions on the Rights of the Child: Can International Law Secure the Right to Choose for Minors?*, 16 TEX. J. WOMEN & L. 185, 202–03 (Spring 2007).

127. Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Columbia*, ¶ 3(c), U.N. Doc. CRC/C/COL/CO/3 (June 8, 2006).

128. Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Chile*, ¶ 55, U.N. Doc. CRC/C/CHL/CO/3 (Apr. 23, 2007).

129. Campaign, *supra* note 84.

believe differently. The government of Scotland published the following to help youth understand their rights under the CRC: "You have the right to choose your own religion and beliefs. Your parents should help you think about this."[130] Thus, based on this implementation of the CRC in other countries, it is reasonable to infer that children have the right to choose their own religion under the CRC.

Seventh, the Children's Rights Campaign website asserts as myth the idea that "[r]atification will allow children to join gangs and racist organizations. Parents will not be able to oversee children's interactions with others."[131] Again, the recommendation of the United Nations Committee in its official report on Honduras in 2007 is enlightening: "The Committee recommends that the State party ensure that no restrictions are placed on the right of the child to freedom of association other than those imposed in conformity with Article 15 of the Convention."[132] CRC Article 15(2) states:

> No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.[133]

According to the text of the CRC, imposing restrictions on the child's association other than those authorized by Article 15 is a violation of the treaty.[134] Article 15 says that a pre-condition of any limitation on the child's right of association is that it must be in conformity with the nation's law, and it must be necessary for national security or public safety.[135] Article 15 does not recognize parents' rights to impose restrictions on association beyond those authorized by law. Interestingly, in the United States, it is not illegal

130. THE SCOTTISH GOVERNMENT, THE UN CONVENTION ON THE RIGHTS OF THE CHILD: A GUIDE FOR CHILDREN AND YOUNG PEOPLE (Apr. 2008), *available at* http://www.scotland.gov.uk/library/documents-w9/rotc-01.pdf.

131. Campaign, *supra* note 84.

132. Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Honduras*, ¶ 42, UN Doc. CRC/C/HND/CO/3 (May 3, 2007).

133. CRC, *supra* note 1, art. 15.

134. *Id.*

135. *Id.*

to join racist organizations or cults.[136] Thus, presumably, parents have no authority to prevent their children from joining cults or racist organizations unless the law was changed to make these associations illegal.

Eighth, the Children's Rights Campaign website states as myth that "[t]he Convention provides children with an 'unrestricted' right to access any information they want, including pornography." [137] However, Laurel A. Clyde of the World Library and Information Congress argues that the CRC should give children access to at least some sexually explicit material:

> [T]he school library's collection and services should support gay, lesbian and bisexual students; it should also support the children of gay or lesbian parents or children with other gay/lesbian relatives. In addition, the provision of titles with gay, lesbian or bisexual content and/or characters is important in helping straight students to develop a view of the world that includes families and lifestyles that are different from their own.
>
> Freedom of access to information and literature for young people, freedom of expression, access to information and books reflecting a diversity of views and lifestyles, censorship—these rights, enshrined in the Universal Declaration of Human Rights *and the Convention on the Rights of the Child*, and in important professional documents, are beyond the experience of many (perhaps most) users of school libraries.[138]

CONCLUSION

The Children's Rights Campaign did not quote any critic of the CRC in formulating its various myths.[139] Thus, they have created a series of classic straw men—easy targets that they attempt to knock down.

Some of the "myths," as formulated by the Campaign, were not precisely accurate. But, in every case, one could validly critique the

136. *See generally* Jarrod B. Bazemore, *Warrior Mercenaries or Toy Soldiers: The Rise of Militias in the United States*, 22 LAW & PSYCHOL. REV. 219 (Spring 1998).

137. Campaign, *supra* note 84.

138. Laurel A. Clyde, *School Libraries and Social Responsibility: Support for Special Groups and Issues—The Case of Homosexuality*, WORLD LIBR. AND INFO. CONG.: 69TH IFLA GEN. CONF. AND COUNCIL, 7–8 (Aug. 2003), *available at* http://ifla.queenslibrary.org/IV/ifla69/papers/192e-Clyde.pdf (emphasis added).

139. *See generally* Campaign, *supra* note 84.

Convention in relation to the "myth" statement. In some cases, the so-called "myth" is clearly true. In short, it is very clear that the proponents of the CRC leave much to be desired in accuracy and analysis of international and domestic law.

The CRC is legally binding upon the State Parties.[140] It has meaning. It can be enforced in domestic courts.[141] Nations that ratify it are obligated under international law to comply with its terms.[142]

CRC advocates reject all criticism of the Convention with a peremptory wave of the hand. But, in fact, it is evident that the arguments of CRC opponents are substantially validated by the actual decisions and reports of the official United Nations Committee on the Rights of the Child and by the writings of other pro-CRC experts like Professor Van Bueren. The American advocates of the CRC appear to be heavily reliant on a bold bluff. The opponents of the CRC only hope that the Senate asks to see their cards.

140. CRC, *supra* note 1, art. 2.

141. *Id.* art. 3.

142. Curtis A Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution,* 48 HARV. INT'L L.J. 307, 307–08 (2007).

PARENTAL RIGHTS

The Fight of Our Lifetime

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PARENTAL RIGHTS
The Fight of Our Lifetime

At every stage of life, there is no greater resource and refuge for a child than the love of a parent. Time and time again, studies have found and affirmed that the nurture and love of parents plays a crucial role in positively shaping the future of their children.

But a storm is on the horizon. It is a storm that threatens the vital child-parent relationship. It is a struggle over who makes the crucial decisions for our children.

The Supreme Court, once a bastion of freedom and protection for parents, may have already shifted to the point where it no longer recognizes the fundamental right of parents to direct the upbringing and education of their children. This pro-government/anti-parent bias is becoming more and more prevalent every day in the law and in the news.

Beyond our shores, an attitude of preferring the state over the parent is becoming gradually more pervasive and alarming, as governments and activists in the international community seek to transform parental rights into parental *responsibilities* -- responsibilities that the state is willing to enforce. Across the globe, the choices that parents make are being challenged, and sometimes even overturned, only to be replaced by the decisions of state officials who barely know the child.

Throughout our history, the United States of America has recognized and defended the rights of parents to raise and protect their children. It is time for all Americans who affirm the vital child-parent relationship to rise up and defend parental rights within the text of the Constitution itself. This is the only way to secure parental rights forever for our children, their children, and future generations of Americans.

This paper is meant to be a resource for those who seek to secure these rights. It begins by discussing the domestic threat that American judges – from both the conservative and liberal ends of the spectrum – are posing to parental rights by challenging their existence. It then considers the international threat of treaty agreements that would bind parents (such as the United Nations Convention on the Rights of the Child) and a dangerous new legal doctrine called customary international law, which threatens to supersede American law with or without our consent. It concludes with the solution: a constitutional amendment to protect parental rights and preserve them from the reaches of these dangerous domestic and international forces.

No government, regardless of how well-intentioned it might be, can replace the love and nurture of a parent in the life of a child. A parent is willing to brave danger and sacrifice, hardship and heartache. A parent cares, not because her children are "wards" for whom she is responsible. A parent cares because he wants his son to have opportunities he never had; because she hopes that her little child will grow up to be healthy, strong, and secure; because they want their children to one day have families of their own.

This is why parental rights must be secured. This is why this fight is the fight of our lifetime.

THE DOMESTIC THREAT

The Battle for Parental Rights in the American Courts

America's rich heritage as a defender of parental rights is in grave danger. Our courts have become sharply divided on whether parental rights deserve constitutional protection, and some have taken a strong stance against parents and the family. A handful of judges are rewriting America's heritage of freedom.

The Assault on Parental Rights

- A minority of Justices on the Supreme Court believe parental rights deserve "fundamental" constitutional protection.
- Some judges believe parental rights exist, but will not recognize them unless they are explicitly written in the Constitution; others do not believe that these parental rights exist at all.
- Many lower court judges, who handle the majority of real-life cases, have taken a strong stance with the state against recognition of parental rights.

FUNDAMENTAL RIGHTS UNDER FIRE

The Supreme Court has recognized two categories of rights: "fundamental" and "non-fundamental." If a right is "fundamental," the state must prove that it has an interest "of the highest order" *before* it violates your rights, *and* that the state is using the "least restrictive means" to do so.[1] If, however, a right is "non-fundamental," the government only needs to show that it has a rational reason to restrict your rights. The burden of proof is on *you* to show that the state's actions are irrational and illegitimate.

In the 2000 case of *Troxel v. Granville*, only four of the nine Supreme Court justices expressly agreed that the Constitution "protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."[2] Two of them — then-Chief Justice William Rhenquist and Justice Sandra Day O'Connor — have since left the Court. Surprisingly, Rhenquist and O'Connor were joined in this viewpoint by Stephen Breyer and Ruth Bader Ginsberg, two of the most liberal justices on the Court today.[3] While both agreed in *Troxel* that parental rights are fundamental, it is uncertain whether they can be trusted to consistently uphold parental rights in the years to come.

These four justices concluded that the state cannot override the decisions of parents "simply because a state judge believes a 'better' decision could be made" — the state must have a compelling reason before it infringes on parental rights.[4] Ultimately, six justices sided with the parents in Troxel — a narrow victory on an uncertain foundation.

In the battle for the "fundamental" status of parental rights, opponents come from both ends of the judicial spectrum. On one side are judges who agree that parental rights exist, but are leery of supporting them because they are not explicitly protected in the Constitution. On the other side are judges who refuse to recognize that parental rights exist at all. Parents are

left in the middle.

Scalia and "Implied Rights"

The most prominent example of the first type of judge is Supreme Court justice Antonin Scalia, a conservative jurist who considers himself to be a "strict constructionist," meaning that he believes the Constitution has a fixed meaning that is apparent from the text, instead of having subtle, hidden meanings that judges can read into the text.

When the Supreme Court decided in *Troxel* that parental rights were fundamental, Scalia disagreed. Even though he felt that parental rights were among the "unalienable rights" of Americans,[5] Scalia noted that there was no explicit recognition of parental rights in the Constitution. Thus, Scalia voted against the judicial recognition of parental rights, fearing that if the Court recognized an *implied right*, the courts could reinterpret that right at will, and freely interfere with family law whenever they wished.[6]

The Supreme Court and Parental Rights	
Fundamental Right	**Non-fundamental Right**
Ruth Bader Ginsberg Stephen Breyer Clarence Thomas (?)	David Souter Antonin Scalia
*William Rhenquist ** *Sandra Day O'Connor**	**No Constitutional Right** Anthony Kennedy John Paul Stevens
Unknown Chief Justice John Roberts Samuel Alito	

** No longer on the Court*

(?) Justice Thomas' position on parental rights is uncertain at best. While he voted for the parent in Troxel, Thomas declined to join the majority's opinion, and hinted in his concurring opinion that had the case considered whether the Court could enforce unenumerated rights, he might have ruled against parental rights.

Thomas and "Original Intent"

Another conservative jurist, Justice Clarence Thomas, voted for the parent in *Troxel*, but questioned whether parental rights were "fundamental." Thomas's reasoning (similar to Scalia's) was that the "original intent" of the Due Process Clause prohibited judicial enforcement of "unenumerated" rights.[7] However, since neither party raised that legal issue in *Troxel*, Thomas voted on the side of the parents to be consistent with precedent.

Hostility to Parental Rights

At the other end of the spectrum of opponents, Justice David Souter held that parental rights were "generally protected" by the Constitution, but were not fundamental.[8] Of the three remaining justices, Justice Scalia agreed with Justice Souter that parental rights were not fundamental rights, while Justices Anthony Kennedy and John Paul Stevens did not even recognize the rights of parents in the Constitution.[9]

The Unknown

The two newest justices on the Court, John Roberts and Samuel Alito, do not have a proven voting record when it comes to parental rights. While both are conservative judges, they could come down either way on parental rights — but even if both side with parental rights as "fundamental," that still only leaves a minority of four Justices who believe that parents currently have a fundamental right protected by the Constitution the way it has historically been interpreted.

TROUBLE IN THE LOWER COURTS

There is one more threat to parental rights that bears mentioning. In order for the Supreme Court's decision in a case to govern other courts, a *majority* of judges must agree on the same opinion — hut only 4 of the 9 judges on the Court voted for the same opinion in *Troxel.*

Citing this fact, many lower courts (which handle everyday cases that affect parents) have used *Troxel* to undermine parental rights, claiming that since the Supreme Court cannot agree, the lower courts are free to decide a case however they wish. As recently as September 2007, federal judges in the First Circuit ruled that social workers did not violate the constitution as long as they made a "plausible decision" before removing a child from the home.[10]

CONCLUSION

The United States has a rich history of protecting the fundamental rights of parents, but across our nation, that perception is changing. What is more, opponents of parental rights are not only gaining support from these domestic threats, but are also receiving support from a new ally — the rising force of international law.

For further reading:

[1] *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

[2] *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

3 *Troxel* (Syllabus), 530 U.S. at 57-58.

[4] *Troxel*, 530 U.S. at 72-73 (2000).

[5] *Troxel* (Scalia, dissent), 530 U.S. at 91-92.

[6] *Troxel* (Scalia, dissent), 530 U.S. at 93.

[7] *Troxel* (Thomas, concurring), 530 U.S. at 80.

[8] *Troxel* (Souter, concurring), 530 U.S. at 77.

[9] *Troxel* (dissents), 530 U.S. at 80, 91, 93.

[10] *Carter v. Lindgren*, No. 06-2539 (1st Cir. Sept. 7, 2007).

THE INTERNATIONAL THREAT

The Menace of International Law

Fortunately, the United States is among the handful of nations whose history and heritage has (until recently) valued parental rights. Across the globe, a vast coalition wields two weapons against the family. One weapon seeks to implement international agreements that elevate the power of the state over the rights of parents. Another weapon, a dangerous new legal doctrine, threatens to impose these international trends upon us — with or without our consent.

THE WORLD'S FAMILY

In 1995, President Clinton signed the UN Convention on the Rights of the Child (CRC), an international treaty which requires the state to protect "the best interests of the child."[1] Despite Clinton's signature, the Senate has not ratified the CRC, and even under Clinton, no President has formally sent the CRC to the Senate for possible ratification.

Article 18 of the CRC declares that parents have "the primary responsibility" for the upbringing and development of the child. The best interests of the child will be their basic concern."[2] In doing so, the CRC converts parental *rights* into parental *responsibilities* to "act in the best interests of their children"[3] – not only in public spheres, but also "in private spheres, such as the home."[4]

By stripping parents of rights and replacing them with responsibilities, "best interests provides decision and policy makers with the authority to substitute their own decisions for either the child's or the parents."[5] Parents lose their ability to make decisions for their children and their family, and surrender that authority to the state.

REJECTING OUR HERITAGE

The Supreme Court held in 1978 that the Constitution would be offended if a state attempted to break up the family because "it thought that to do so was in the children's best interest,"[6] and *Troxel* reiterated in 2000 that the state could not override the decisions of parents "solely on the judge's determination of the child's best interests."[7] But if the CRC were ratified, these guarantees to parents would be void. Under the Constitution, treaties are part of the "supreme law of the land"[8] — overriding everything but the express language of the U.S. Constitution and its amendments. No one can force a nation to enter into a treaty, but once the treaty is accepted, that nation is legally obligated to do what it says.[9] If America ratifies the CRC, it will be bound to honor its provisions.

NO REFUGE IN "RIGHTS"

Can a treaty override our rights under the Constitution? A treaty cannot override a constitutional right — as long as that right is *explicitly* protected in the Constitution. But as

Scalia and Thomas noted in *Troxel*, parental rights are not enumerated in the Constitution. In the 1920 case of *Missouri v. Holland*, the Supreme Court held that more was required than "some invisible radiation" from a constitutional provision in order to be shielded from a treaty's requirements. An implied right is not protected from the reaches of an international treaty.

This places parental rights directly in the path of destruction: because they are not explicitly protected by the Constitution, any treaty that the U. S. ratifies can override them — including the *Convention on the Rights of the Child.*

But the story gets worse. Even if the U.S. never ratifies the CRC, America could still be forced to yield to its provisions, under the legal doctrine of customary international law.

THE RISING SPECTER OF CUSTOMARY INTERNATIONAL LAW

Customary international law (CIL) is "comprised of the customs and usages among nations of the world."[10] If a custom is widely practiced by other nations, it becomes part of the international law — even if Congress never ratifies it. Because every nation in the world (except the United States and Somalia) has adopted the CRC, a growing coalition of judges believes that the CRC is customary international law and influences U.S. law — *even though the U.S. has not ratified it.*

In *Roper v. Simmons*, the Supreme Court struck down the juvenile death penalty, emphasizing repeatedly that the CRC prohibits the death penalty, and that "the United States now stands alone in a world that has turned its face against the juvenile death penalty."[11] The weight of international opinion, though not *binding*, provided significant confirmation for the Court's conclusions.[12]

WHEN THE STATE BECOMES THE PARENT

Whether the CRC is adopted by the U.S Senate or imposed by the forces of customary international law, the result will be the same: parents will lose their ability to make decisions for their children. At best, the government will have constant grounds to challenge the everyday decisions that parents makes, even in the privacy of their own home; at worst, the state will have the power to override the decisions of parents and become, in effect, the *true* parent of every child.

Here is a brief summary of how the CRC, either ratified or imposed, would significantly alter parental rights:

Prohibition of Corporal Punishment

Article 19 of the CRC commands that the child shall be protected "from all forms of physical or mental violence." Across the board, the UN's Committee on the Rights of the Child has held that this article "requires the protection of children from all forms of violence, which includes corporal punishment in the family."[13] The United Kingdom has been subjected to considerable censure for its continued defense of "reasonable chastisement," which the UN has denounced as "a serious violation of the dignity of the child."[14]

Expansive Government Oversight of Home Schooling

Article 28 of the CRC requires the government to "recognize the right of the child to education." In order to achieve this right, the government must "make primary education compulsory and available free to all," and "take measures to encourage regular attendance at schools." Further, in Article 29, the Convention states that education should develop "respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations." Finally, the Convention allows for education by private individuals, as long as the "education given in such institutions shall conform to such minimum standards as may be laid down by the State."

At the very least, the freedom to home school would be subjected to government oversight and review, to ensure that parents are meeting these educational "standards." Parents who refuse to teach their children to respect the principles "enshrined in the Charter of the United Nations" could face prosecution by the state. At worst, these provisions of the CRC could completely erase home schooling as a legitimate option of education.

Exhaustive Collection of Private Information

Paradoxically, the protection of the child's rights requires that the government amass an exhaustive collection of private information about children. Throughout its country reports, the Committee on the Rights of the Child has consistently urged governments to "establish a central registry for data collection and introduce a comprehensive system of data collection incorporating *all the areas covered by the Convention.*"[15] Because the Convention covers everything from the child's economic welfare, to medical decisions, to familial relationships, to physical and mental well-being, the extent of the government's ability to collect information is virtually limitless.

A Child's Right to Make Autonomous Decisions

Throughout the Convention, the government is commanded to respect "the evolving capacities of the child" by promoting and facilitating "respect for the views of children and their participation in all matters affecting them," whether in schools, judicial proceedings, or family life.[16] The government is charged with ensuring that children enjoy their "*fundamental freedoms, including those of opinion, expression and association*," within the family setting.[17]

If the government is charged with ensuring that children participate in "all matters affecting them," nothing prevents the government from substituting its own will for that of a parent.

A number of years ago, a thirteen-year old boy brought his parents to court under a Washington state statute which sought to give children who were in "conflict with their parents" a right to be heard. The conflict? His parents wanted him to attend church on Sunday morning, Sunday evening, and Wednesday evening, while the boy only wanted to attend once a week. The trial judge ruled that if the parents wanted their son back, they needed to limit his church attendance because once a week was enough church for a 13-year old boy. Afraid of losing their son, the parents agreed to obey the judge's order.

Removal of the Child from the Home

As has been previously mentioned, if the parents fail to uphold their responsibilities under the CRC, the state has an obligation to intervene. In nations that have already adopted the CRC, this "intervention" often comes in the form of a parent's worst nightmare: the loss of their child.

In August 2007, British Child Protective Services informed an expectant mother that she would lose her child because she was "diagnosed with depression and a personality disorder, leading to concerns that her baby might be subjected to 'emotional abuse,'" – even though she has never been accused of posing physical danger to a child.[18] British CPS has threatened another expectant mother with the loss of her baby because she too is "capable of 'emotional abuse,'" even though her psychologist has testified that she poses no threat to her child."[20] When asked to justify their actions, British CPS said that decisions like these have to be made by social workers who have to consider the best interests of the child.[21]

Sadly, stories like these are becoming common. In 2006, more than 2000 babies under one year old were taken from their parents — three times the number ten years ago,[22] and many of these parents "were not told why their children were taken away."[23]

What constitutes "emotional abuse"? According to the American Medical Association, "emotional abuse" can be something as simple as "making fun of a child, calling a child names, and always finding fault."[24] Article 19 of the CRC, however, commands parents to "protect children from all forms of physical or *mental violence*" – another term for "emotional abuse." If parents fail to protect their children from these "negative influences," the state is obligated under the CRC to intervene – even if that means removing the child from the home.

CONCLUSION

The "best interests of the child" phrase empowers the *state* to make decisions about the welfare and happiness of a child it has never even met: in short, the state becomes the parent. Thankfully, there is still time to secure this right for ourselves and our children — if we are willing to act now.

For further reading:

[1] *Convention on the Rights of the Child*, art. 3.

[2] *Convention*, art. 18.1.

[3] UNICEF, *Implementation Handbook for the UN Convention on the Rights of the Child*, 46.

[4] Van Bueren, *International Rights of the Child: Section A*, 8.

[5] Van Bueren, 46.

[6] *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978).

[7] *Troxel v. Granville*, 530 U.S. 57, 67 (2000).

[8] *U.S. Constitution*, art. VI.

[9] Van Bueren, 6.

[10] *Maria v. McElroy*, 68 F.Supp. 2d 206, 233 (E.D.N.Y. 1999).

[11] *Roper v. Simmons*, 543 U.S. 551, 576, 577 (2005).

[12] *Roper*, 543 U.S. at 578.

[13] UN Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties, Concluding observations: New Zealand* (27 October 2003): CRC/C/15/Add.216.

[14] UN Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties, Concluding observations: United Kingdom of Great Britain and Northern Ireland* (9 October 2002): CRC/C/15/Add.188.

[15] UN Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Thirty-sixth session, Concluding observations: France* (4 June 2004): CRC/C/15/Add.240.

[16] UN Committee ou the Rights of the Child, *Consideration of Reports Submitted by States Parties, Concluding observations: France* (4 June 2004): CRC/C/15/Add.240.

[17] UN Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties, Concluding observations:* ***Mexico*** (10 November 1999): CRC/C/15/Add.112.

[18] Sunday Telegraph, "YouTube row over social services baby threat," Aug. 20, 2007.

[19] London Daily Telegraph, "Threat to take new-born over emotional abuse," Aug. 26, 2007.

[20] Sunday Telegraph, Aug. 20, 2007.

[21] The Daily Mail, "My baby will be taken from me the moment it's born," Sept. 6, 2007.

[22] The Daily Mail, Sept. 6, 2007.

[23] American Medical Association, *Child Abuse and Neglect*.

[24] UNICEF, *Implementation Handbook*, 258.

THE SOLUTION

For our Children and Grandchildren: The Parental Rights Amendment

If we are to secure America's rich heritage of freedom from the decisions of American judges and from the dangers of international law, we must act now to enshrine these rights in the surest protector of our rights and liberties — the Constitution of the United States. Nothing short of a constitutional amendment can ensure that we and our children will have the freedom to raise the next generation of prosperous and vigilant citizens.

The Solution:
Amending the Constitution

- Only a Constitutional Amendment can ensure that parental rights will be honored in the United States, and protect these rights from the threat of international law.
- Only 33 amendments have ever been passed by Congress, and of these, only 27 have been ratified by the states.
- Passing an amendment takes supporters at every level of government — in Congress, in committees, and in the states. Every American can make a difference by *becoming involved.*

WHY A CONSTITUTIONAL AMENDMENT?

If creating a constitutional amendment is so difficult, why should we pursue it? Quite simply, amending the Constitution is the only way to secure our parental rights.

Only a constitutional amendment will ensure that the government respects and honors the vital relationship between children and their parents that our nation has long recognized. It is also the only way to secure this right regardless of the *judges* who fill the Supreme Court. The founding fathers created a nation ruled by *laws*, not men — placing parental rights in the text of the Constitution ensures that *law* will defend the American family. Lastly, only an explicit constitutional amendment that recognizes parental rights can combat customary international law and protect the family from international treaties (like the UN Convention on the Rights of the Child) that place the state in the role of parents. If these dangerous international forces remain unchecked, America could one day transform parental rights into responsibilities.

If a strategy to secure parental rights does not neutralize both the domestic and the international threats, then it will ultimately fail. Only a constitutional amendment completely eliminates these threats.

A DIFFICULT ROAD

Every year, some two hundred amendments to the U.S. Constitution are introduced, but only 33 have been passed by both the House and the Senate in Congress, and of these, only 27

have been ratified by three-quarters of the states (including the ten in the original Bill of Rights).

An amendment to the Constitution begins when a bill is *introduced* in Congress. The bill is then assigned to a *committee*, which considers the proposed text, altering it as needed. Because of the vast amount of bills that Congress receives each year, many are not even considered by committees, and many more are voted down before they make it back to the House or Senate. If the committee approves the bill, it is then debated and must be approved by a two-thirds vote of both the House *and* the Senate. Only thirty-three proposed amendments have cleared this threshold.

Once passed by Congress, the amendment must be ratified by three-fourths of the states. If it gains the approval of 37 states, it joins the elite group of 27 constitutional amendments which have been added to the Constitution.

DRAFT PARENTAL RIGHTS AMENDMENT FOR THE UNITED STATES CONSTITUTION

SECTION 1

The liberty of parents to direct the upbringing and education of their children is a fundamental right.

SECTION 2

Neither the United States nor any state shall infringe upon this right without demonstrating that its governmental interest as applied to the person is of the highest order and not otherwise served.

SECTION 3

No treaty nor any source of international law may be employed to supersede, modify, interpret, or apply to the rights guaranteed by this article.

AN IMPOSSIBLE TASK?

Amending the Constitution is an enormous task — it requires time, resources, vision, dedication, and hard-working people who will make it happen. But it is not an impossible task.

ParentalRights.org is a growing coalition of individuals who are bringing together their time, resources, vision, and dedication — individuals who believe that the vital role of parents in the lives of their children should be protected and cherished. If government officials want to interfere in the family, they must prove that they have a compelling reason to do so, *not* because they think they can do a better job than the child's parents. The vast majority of parents know their children better and love them more than a government official ever could. The government should be *supporting parents* as they raise their children — not the other way around.

You do not need to be a full-time politician or lobbyist to make a difference — the support of *every American* is vital to this process. Here are some practical ways that you as a home school leader can get involved in the fight for parental rights:

- Visit ParentalRights.org and sign the petition for a constitutional amendment to protect parental rights
- Consider partnering with ParentalRights.org to make this amendment a reality.
- Continue to pray for the success of this amendment.
- Share the need for this amendment with families in your church and community. Encourage them to join the fight to secure their parental rights.

THE FIGHT OF OUR LIFETIME

The battle for parental rights is the fight of every American, because it is the battle for future generations of great Americans. Time still remains for us to make a difference, and to take a stand for freedom.

This is the fight of our lifetime — and together, we can win it.

Parental Rights: Why Now is the Time to Act

By Michael P. Farris, J.D.
President, ParentalRights.org

Go to www.parentalrights.org to learn more and sign the petition!

> *Want of foresight, unwillingness to act when action would be simple and effective, lack of clear thinking, confusion of counsel until the emergency comes, until self-preservation strikes its jarring gong—these are the features which constitute the endless repetition of history.*—Winston Churchill, speech, House of Commons, May 2, 1935.[1]

There were early warning signs that homosexual "marriage" should be taken seriously. On May 27, 1993, the Supreme Court of Hawaii ruled that it was unconstitutional to deny marriage licenses to three same-sex couples. A voter initiative eventually trumped this decision, but at least by this date the battle was fully engaged.

Yet, the responses of the pro-family community, judged with the aid of 20/20 hindsight, have to be regarded as too little, too late. Homosexual marriages are now being performed in this nation. And while there have been a number of successful efforts to place traditional marriage language into state constitutions, efforts to bring in a federal constitutional amendment are essentially stalled. Even more troubling is the fact that the momentum in the legal system is moving rapidly in the direction of declaring homosexual marriage a federal constitutional right. If this happens, all state constitutional efforts will be for naught.

A friend in Congress recently told me that if the issue had been brought to the floor of the House 15–20 years ago, there is no doubt that a constitutional amendment to ban same-sex marriage would have passed. There is substantial doubt that such an amendment will ever pass at this point.

The pro-family movement waited until Congress believed there was a real problem before attempting a constitutional solution, even though legal experts have been united for nearly a decade in saying that the only way to stop the courts' march toward homosexual marriage is with a federal constitutional amendment. By now, our opponents have gained so much strength in both law and culture that the prospects for the right solution are daunting at best.

This article is about the need to save parental rights. I use the story of the battle to save marriage solely as a cautionary tale. The threats to parental rights are real and growing. And we must face the fact that the right of parents to direct the upbringing and education of their children is not explicitly written in the text of the Constitution. If we wish to preserve this right, it is my contention that *now* is the time to put parents' rights into black and white—that is, to adopt an explicit constitutional amendment.

If we wait until the threat fully matures, we will have waited too long.

The History of Parental Rights Protection

We should start with the question: why did the Founders neglect to include parental rights in the text of the Constitution or Bill of Rights?

We must remember that the whole concept of a legally enforceable bill of rights was an innovative concept that was newly conceived in the American Republic. James Madison once remarked that a bill of rights was but a "parchment barrier"—that is, a paper tiger. Madison had witnessed invasions of religious liberty even after Virginia adopted religious freedom in its 1776 Bill of Rights. At the time, the view was that religious liberty was truly achieved in 1786 when a Virginia statute made this guarantee effective. This is completely backwards under our current legal theories. Constitutional provisions are more powerful than statutes. But in the Founding era, because the British system had no written constitution, the idea of a law higher than a statute was still a relatively novel idea. It was not until the U.S. Constitution was adopted as the "highest law of the land" that it became possible to have a bill of rights that was understood as a robust protection of our liberty.

Moreover, it was unimaginable that a socialistic state which purported to care for children over and against fit and willing parents would ever result from the state and national governments being created in the wake of our separation from Britain. No one would ever envision a form of government that pitted fit parents against the state over the right to make decisions concerning their children.

Thus, it was some time before a constitutional clash occurred between parents and the government over the right to raise children. It happened in Oregon in the 1920s, when the anti-Catholic bigotry of the era manifested itself in a law which banned all private education and demanded that children must be educated only in government schools.

It was reminiscent of a law in the era of King James which imposed a fine on parents who sent their children to "papist" colleges on the continent—there being only Anglican colleges in Britain at the time.

But this was a free America—not the tyrannical era of the Tudor monarchs. And free America, instead of telling parents that their children must attend a particular denomination's schools, told them that they must present their children to the government for compulsory instruction.

The Supreme Court heard the case of *Pierce v. Society of Sisters* in 1925 and rendered an incredibly important decision that trumpeted this principle:

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.

While homeschoolers have both praised and relied upon this decision, we must recognize the basis on which the Supreme Court found parental rights to be a constitutionally protectable interest to be a bit thin. The legal principle used in *Pierce* was first announced in *Meyer v. Nebraska*. The Court announced that "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men" were protected under the Due Process Clause. This historically grounded formula was eventually "refined" to protect the rights that are "implicit in the concept of ordered liberty." (The first use of this phrase was in the 1937 Supreme Court decision in *Palko v. Connecticut*.)

If implicit rights are tied to history, then there is a solid basis for determining what was a recognized right at a particular point in time. But when the discovery of "implicit rights" is simply left up to the personal opinions of Supreme Court justices, this theory becomes a vehicle which can be used by justices to impose their personal political opinions on an entire nation.

It is from this very doctrine that the Court invented the right to abortion in *Roe v. Wade* and the right to practice homosexuality in *Lawrence v. Texas*. Because the theory of implicit rights lost any connection with common law history, the legal footing for parental rights now stands on the same dubious foundation as the right to abortion and homosexuality.

The Current Supreme Court and Parental Rights

In the most recent parental rights decision by the Supreme Court (*Troxel v. Granville*), Justice Scalia made it clear that he is a political supporter of the concept of parental rights. He believes that this right is an inalienable human right and was included within the Ninth Amendment's declaration of reserved rights. However, because parental rights are not explicitly stated in any constitutional language, Scalia voted to deny parental rights the status of an enforceable constitutional right.

Troxel v. Granville was a plurality decision with six separate opinions. None of these conflicting opinions commanded a clear majority. Two of the justices voting in favor of parental rights have now left the court. They have been replaced by John Roberts and Samuel Alito, who are reputed to share many of the legal views of Scalia. Whether Roberts and Alito think like Scalia remains to be seen. But it is beyond question that many young conservative legal scholars are trained to think just like Scalia on this point. His views are the mainstream among groups like the Federalist Society.

In short, Scalia believes that no right is protected unless it is expressly stated in the text of the Constitution. While most of us like this theory if it is used to reverse *Roe v. Wade*, we would be quite alarmed if parental rights were suddenly no longer a protected constitutional right.

The *Troxel* case dealt with the right of grandparents to demand visitation with their grandchildren over the objection of the children's parents. Only four justices joined the main opinion of the Court, which held that parental rights were "fundamental," meriting the highest level of constitutional protection. (Two of these, Rehnquist and O'Connor, are the justices who have since left the Court.) Justice Thomas wrote an opinion concurring in this result and emphasizing the same basic legal test.

Justice Souter wrote a separate opinion saying that parents have rights, but not fundamental rights. This means he holds a low view of parental rights.

As we already noted, Justice Scalia said that parental rights were not protected because they are not explicitly in the Constitution.

Justice Stevens held that parents do not have the right to override state legislative decisions of this nature—which is consistent with Stevens' overall anti-tradition, anti-religious perspective.

Justice Kennedy believed that modern family life was too complicated to be run simply by parents and he advocated a "balanced" approach, which is consistent with Kennedy's general anti-traditional theories.

Accordingly, we have only three current Supreme Court justices (including Thomas) who sided with a strong view of parental rights in this most recent decision. And two of these are among the most liberal members of the Court—Stephen Breyer and Ruth Bader Ginsburg.

Even if Alito and Roberts are both strong advocates of parental rights, we should not rest our confidence for the future of this country on a current five-to-four Supreme Court majority.

The Threat from the Left

In 2002, I published a novel, *Forbid Them Not* (Broadman & Holman), with the premise that a thinly-disguised Hillary Clinton had been elected president. The first act of her new administration was to secure the ratification of the UN Convention on the Rights of the Child (UNCRC). I do not claim the gift of prophecy, but there is a looming possibility that I may be proven right.

If this treaty becomes binding on the United States, the government would have the power to intervene in a child's life "for the best interest of the child." Currently, the government can intervene in this fashion only by going to court and proving that parents have been abusive or have neglected their children. (This standard also applies in divorce cases on the presumption that the family unit has been broken.) This means that whenever the UN-dominated social services system thought that your parental choices were not the best, the government would have the power to override your choices and protect your child from you. If this treaty becomes binding, all parents would have the same legal status as abusive parents, because the government would have the right to override every parental decision if it deemed the parent's choice contrary to the child's best interest.

Specifically, spanking would be banned under the express terms of the UNCRC. Moreover, children would be required to be taught in a religiously "tolerant manner". (The American Bar Association, which supports the treaty, has already opined that teaching children that Jesus is the only way to God violates the spirit and meaning of the UNCRC.) The ability to homeschool one's children would become not a right, but a UN-supervised activity that could be overturned if social services personnel believed that it would be "best" for your child to receive another form of education. These are not idle speculations, but the proven result of the UN's own interpretation of the treaty as they have reviewed other nations' compliance with the treaty's provisions.

Here's the difference: No other major nation in the world has a constitutional provision that makes a provision of a treaty automatically part of the "highest law of the land." This is the Constitution's Achilles heel. In every other nation, the UNCRC is a political liability—if ratified in America, it would be an enforceable and binding law.

Under existing Supreme Court precedent, a treaty cannot override an express provision of the U.S. Constitution. But a treaty can override a reserved right (*Missouri v. Holland*). And a treaty certainly can override either a state constitution or state statute. Parental rights are reserved (or implied) rights; they are not an express provision within the Constitution.

A ratified treaty would clearly threaten our longstanding constitutional recognition of the liberty to raise our children. Moreover, it would instantly override every legislative victory ever won for homeschooling.

A federal district court has already ruled, in two separate cases, that the UNCRC is binding on the United States under the doctrine of customary international law. The Supreme Court has also begun to use the UN Convention, not as binding authority, but as persuasive authority in interpreting the Constitution. For instance, in the recent case *Roper v. Simmons*, the Court enacted a new statute-like rule that no state may impose the death penalty on juveniles—based in part on the Court's reading of this UN Convention.

The left does not believe in parental rights and has the legal and political mechanisms in place to fully eradicate this liberty.

What Do We Do?

What we don't do is wait around for doomsday.

Listen to Winston Churchill once again: "Want of foresight, unwillingness to act when action would be simple and effective, lack of clear thinking, confusion of counsel until the emergency comes, until self-preservation strikes its jarring gong—these are the features which constitute the endless repetition of history."

We need to act now, by an express constitutional amendment, to preserve the right of parents to direct and control the upbringing and education of their children.

While state laws and state constitutions are good ideas, they are utterly insufficient on their own because a treaty overrides all forms of state law—no matter if the treaty is actually ratified, or forced upon the nation by the courts through the doctrine of customary international law.

The only solution that works is a United States constitutional amendment. This stops all threats including treaties. Nothing else works in *every* case.

No interest group in America has ever achieved something this big, at least not since the Eighteenth Amendment enacted prohibition. But God blesses outnumbered people who stand for what is right. As homeschoolers, we have seen His blessing, protection, and victories over political adversaries that were considered overwhelming.

We will not succeed with a tepid plan for a partial victory.

There is no group in America as well situated, as well trained, or as strongly committed to parental liberty as homeschoolers. And we have allies. We need to raise the banner, create a plan for victory, and secure our place in history as the generation that placed the God-given right of parents into the category of expressly protected rights in the U.S. Constitution.

This may take a number of years. But we cannot wait until it is too late to start. Members of Congress will tell us that they are not ready to respond to protect parental rights until the threat is more advanced. We must not believe them. The issue of homosexual marriage is well advanced and they still do nothing.

Parental rights will be an urgent matter in Washington not when the UN Convention agents are at your door, but when sufficient Americans are at the doors of Congress, demanding protection now.

The time to fight is now. HSLDA is drafting a constitutional amendment and circulating it to friendly lawyers and organizations for review and comment. Once the text is done, we will find sponsors in the House and Senate. Achieving sponsorship, passage, and ratification will take an unbelievable effort from all of us and all of our allies. But we must not rest until the amendment becomes law.

Do not think this will be easy. This is the fight of our generation. We will be falsely accused of wanting to protect child abuse. We will be falsely accused of meddling unnecessarily with the sacred Constitution. But we cannot be daunted by such duplicity.

God has given us our children and our citizenship. We must use our citizenship now to make sure that our children will have the same rights as we do to raise the next generation in the nurture and admonition of the Lord.

Will you stand up now, or will you wait until it is too late?

i *Winston S. Churchill: His Complete Speeches, 1897-1963*, ed. Robert Rhodes James (NY: Chelsea House Publishers, 1974), 6:5592.

Go to www.parentalrights.org to learn more and sign the petition!

Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, Ranking Member, Committee on the Judiciary, and Member, Subcommittee on the Constitution

Mr. Chairman, the bond between parent and child has long been respected by our legal system as a fundamental right. Although not among the enumerated rights in the Constitution, the right of "parents and guardians to direct the upbringing and education of children under their control" has been among the core rights protected by the Due Process Clause.

While I know that some of my colleagues on the other side are not big fans of unenumerated rights, and are certainly not fans of the line of cases establishing the liberty interest under the Due Process Clause that also gave us *Roe v. Wade,* I believe that the desire to preserve parental rights cuts across ideological and party lines.

I think it is important that we keep a few important points in mind.

First, as the Supreme Court famously noted in *Pierce v. Society of Sisters,* "[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children. . . . 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."

In its decision in *Meyer v. Nebraska,* the Court's instructive survey of societies such as ancient Sparta, where children were raised as creatures of the state shows why, if only as a practical matter, ceding that kind of power to the government is undesirable.

More importantly, the bonds of family, and the importance of the family in our society, demand that we respect the family relationship. The court's nearly 90-year jurisprudence reflects these widely held views, and I believe that there is no reason to question that sound rule.

Second, I know that there are some—and we will hear from them today—who have sounded the alarm that parental rights are under attack from our courts, and from the international community. That is unfortunate. While the stray case, or occasional dicta, may sound ominous, I do not believe the case has been made that parental rights, as protected by the Constitution, are in peril. I look forward to today's discussion, and I hope that the witnesses can shed light on this question.

Finally, there is also a great deal of fear that has been generated by concerns that ratification of the United Nations Convention on the Rights of the Child might nullify parental rights. I have to confess, we hear such arguments with respect to nearly every treaty, and they usually have no firmer foundation than this one.

Most organizations that work with families, such as World Vision, believe that the treaty will actually do a great deal to support families and protect children. That is why, according to a World Vision report on the Convention, "World Vision does not view the CRC as a parental code of conduct or as a wedge between parents and children. It is an agreement that aims to protect children from abuse and neglect, and is supportive of the role and authority of parents."

I find it sad that the only two countries left on earth that have not yet ratified the Convention on the Rights of the Child are the United States and Somalia.

United States courts will not suddenly start implementing treaties in ways that violate the Constitution. That just doesn't happen. Treaties are, by and large, non-self executing. Were they, I think a number of people currently on death row in Texas would get new trials now in the wake of the International Court of Justice's decision in the "Case Concerning Avena and Other Mexican Nationals."

In that case, Mexican nationals were criminally prosecuted without being permitted to contact their embassy, and were ultimately sentenced to death. The ICJ ruled in their favor, but Texas has moved forward with the executions, and the Supreme Court has refused to intervene.

The Supreme Court, however, said that "while treaties 'may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms." It would take an act of Congress,

which is always subject to our Constitution, to implement these obligations. If you think otherwise, I suggest you go to death row in Texas and ask the inmates there.

I would, as always, caution my colleagues against pressing forward with a constitutional amendment. There is a reason why we have amended that document so rarely, and why the framers made it so difficult to amend. It should certainly not be amended lightly, and in a case such as this, where a right is already well established under the Constitution, and where the threats are truly speculative, I would have grave reservations about moving forward.

These are all important questions, and I look forward to the witnesses testimony, which I hope will enlighten the debate.