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

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

SECOND SESSION

SEPTEMBER 9, 2014

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CONTENTS

SEPTEMBER 9, 2014

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

TUESDAY, SEPTEMBER 9, 2014

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

COMMITTEE ON THE JUDICIARY

Washington, DC.

The Subcommittee met, pursuant to call, at 2:08 p.m., in room 2141, Rayburn House Office Building, the Honorable Trent Franks (Chairman of the Subcommittee) presiding.

Present: Representatives Franks, Jordan, Chabot, DeSantis, Cohen, Conyers, Scott, and Johnson.

Staff Present: (Majority) John Coleman, Counsel; Tricia White, Clerk; (Minority) James Park, Minority Counsel; and Veronica Eligan, Professional Staff Member.

Mr. FRANKS. The Subcommittee on the Constitution and Civil Justice will come to order, and without objection, the Chair is authorized to declare a recesses of the Committee at any time.

The Subcommittee on the Constitution meets today to consider H.J. Res. 50, proposing an amendment to the Constitution of the United States relating to parental rights.

The late Notre Dame Law School Professor, Anton-Hermann Chroust, is said to have told his students that, "The academics repeatedly declare the natural law to be dead, but every 25 years or so, it comes in again by the back door when some crisis shows the failure," of other approaches.

Our Founding Fathers' appeal to natural law in the Declaration of Independence is an example of when the natural justice was revealed in our Nation. They stated in this founding document that mankind is "endowed by their Creator certain inalienable rights, among them being life, liberty and the pursuit of happiness." And during times in our Nation's history when our laws proved deficient, Americans appealed to higher principles of justice and grounded them in our legal system by amending the United States Constitution.

It is clear to many Americans that natural justice informs us of the inalienable right of parents to direct the of upbringing of their children.

Just a few decades ago, no American would have believed that laws were necessary to protect the rights of parents to direct the care and upbringing of their children because this right was considered so integral, so basic to our way of life. The Supreme Court affirmed this fact in its 1925 decision in *Pierce v. Society of Sisters*. The Court stated that, "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 primary 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 the rights of parents as fundamental, meaning those rights 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, however, was threatened in the year 2000. In the U.S. Supreme Court case *Troxel v. Granville*, a four-judge plurality described parental rights as historically fundamental but declined to apply strict scrutiny, the standard of review used by courts in cases in which fundamental rights are involved. In the wake of *Troxel*, Federal and State courts have permitted governmental intrusions into parental decisions, ranging from the choice of schools 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 that their children may 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 faces 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 decision 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.

The Parental Rights Amendment ensures that treaties or other forms of international law cannot be used to override or modify parental rights. The truths, principles and knowledge implicated into the hearts and minds of our children will help define America's future. In fact, I believe it is the blueprint of whatever future that humanity will have. A government thinking and acting for parents invites harm to our notions of freedom and the rule of law.

The purpose of the Parental Rights Amendment is to establish the rights of parents to direct the education of their children as fundamental. This amendment will also provide clarity to our courts and firmly establish the constitutional protections parents now need from an ever-infringing government.

I want to thank our witnesses for appearing today. I look forward to your testimony.

[The resolution, H.J. Res. 50, follows:]

IA

113TH CONGRESS
1ST SESSION

H. J. RES. 50

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

IN THE HOUSE OF REPRESENTATIVES

JUNE 18, 2013

Mr. MEADOWS (for himself, Mr. MARCHANT, Mr. FRANKS of Arizona, Mr. BONNER, Mr. GINGREY of Georgia, Mr. MCCLINTOCK, Mr. GRAVES of Georgia, Mr. COBLE, Mr. SMITH of New Jersey, Mr. PITTS, Mr. WOLF, Mr. WESTMORELAND, Mr. DUNCAN of South Carolina, Mr. LAMBORN, Mrs. BACHMANN, Mr. HUELSKAMP, Mr. BRIDENSTINE, Mr. WALBERG, Mr. UPTON, Mr. MILLER of Florida, Mr. COLLINS of Georgia, Mr. HUDSON, Mr. HARRIS, Mr. FORBES, Mr. HUNTER, Mr. HUIZENGA of Michigan, Mr. BROUN of Georgia, Mr. STUTZMAN, Mr. PITTENGER, Mr. WENSTRUP, Mr. BARTON, Mr. MULVANEY, Mr. NEUGEBAUER, Mr. WILSON of South Carolina, Mr. JOHNSON of Ohio, Mr. FORTENBERRY, Mr. NUGENT, Mr. JORDAN, Mr. SALMON, and Mr. COLE) 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.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled

intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States:

"ARTICLE —

"SECTION 1. The liberty of parents to direct the upbringing, education, and care of their children is a fundamental right.

"SECTION 2. The parental right to direct education includes the right to choose public, private, religious, or home schools, and the right to make reasonable choices within public schools for one's child.

"SECTION 3. Neither the United States nor any State shall infringe these rights without demonstrating that its governmental interest as applied to the person is of the highest order and not otherwise served.

"SECTION 4. This article shall not be construed to apply to a parental action or decision that would end life.

"SECTION 5. No treaty may be adopted nor shall any source of international law be employed to supersede, modify, interpret, or apply to the rights guaranteed by this article.".

○

Mr. FRANKS. And I now turn to the Ranking Member for his opening statement. Mr. Cohen.

Mr. COHEN. Thank you, Mr. Chair.

And I Am pleased to have met the witnesses earlier. Nice to be with you. The Supreme Court has long recognized that the right of otherwise fit parents and guardians to make decisions about the upbringing of a child under their care is a fundamental right under the 14th Amendment's due process clause. Our witnesses seem to agree on this, on the fact that no constitutional right is absolute.

So the central focus of our discussion today is whether the Constitution should be amended, which it should be done rarely, not only to explicitly state that a parent's right to make child-rearing decisions is fundamental but to enshrine some very specific ideas about the nature and scope of that right into our Constitution.

H.J. Res. 50, the specific proposal before us, would make some potentially dramatic changes to the state of current law and could be harmful if adopted. As a general matter, amending the text of our Constitution is not and should not be a casual matter. Amending the Constitution every time that there is a disagreement over the possible effects of a court decision, which H.J. Res. 50's proponents say is one of the main reasons why a constitutional amendment is needed, weakens the Constitution's basic characters of governing framework, particularly when the concerns driving the change are speculative, as is the case here.

There is a reason why we have amended the Constitution so rarely and why the Framers made it so difficult to amend. As a fundamental document, the Constitution should certainly not be amended because of policy disagreements or speculative risks. In a case such as this where the right is already widely established under the Constitution and where the purported threats are highly speculative, I would have grave reservations about moving forward with a constitutional amendment.

My concerns are only heightened by the fact that H.J. Res. 50 itself is problematic for several reasons. First, who would be protected by this amendment? Section 1 provides that the "liberty of parents to direct the upbringing, education and care of their children is a fundamental right," but does not define who is "a parent."

Does this provision protect guardians or only biological parents? The Supreme Court recognized in *Pierce v. Society of Sisters* in 1925, that the 14th Amendment protected guardians as well as parents. So if this provision were given its most narrow reading, it would be a significant departure from current law.

Would this provision protect sperm donors but not adoptive parents? Would this provision protect same-sex couples who were allowed to adopt in one State but whose adoption is not recognized in another?

Given its most narrow interpretation, H.J. Res. 50 fails to protect the rights of the full spectrum of adults who are legally the primary caretakers of children and does not recognize the diversity of contemporary families and parenthood.

Second, as Professor Catherine Ross has testified in her written statement, section 2 could threaten to undermine our public education system by essentially giving any parent the constitutional right to veto any decision as to how a public school is managed, in-

cluding choices about curricula, reading assignments, and school activities.

Third, H.J. Res. 50 will change the law in areas that have little to do with parental rights. For example, section 4 provides that this article should not be construed to apply to a parental action or decision that would end life. This language could be interpreted to prevent parents from choosing to have an abortion. Moreover, it contains no exceptions for protecting the health of the mother. It is no secret that I am strongly pro choice, and I would be seriously concerned about the substance of this language to the extent that it was aimed at reproductive rights.

But whatever one's views on abortion or reproductive rights such as fundamental change to the law in this area, these areas should not be—changes should not be made through a constitutional amendment that ostensibly is designed to protect parental rights. For these reasons, not only is H.J. Res. 50 not necessary, it is also highly problematic and not worthy of, no pun intended, of adoption.

And I would for the record correct, it was Billie Holiday who wrote "God Bless the Child" in 1938, a Tennessee resident. And John Conyers would have known that, and I am sorry, but I had it wrong.

So, with all reference to that, God Bless the Child. I yield back the balance of my time.

Mr. FRANKS. Sounds like she might have favored this amendment.

I am going to now recognize the Ranking Member of the Committee, Mr. Conyers, for his opening statement.

Mr. CONYERS. Thank you, Mr. Chairman.

I will submit my statement after the excellent job of our Ranking Member Cohen.

But without question, support for the right of parents to direct the upbringing and education of their children cuts across ideological and party lines. And the protection of parental rights under the Constitution has not been questioned, never been questioned at any time by the Supreme Court.

While admittedly not among the enumerated constitutional rights, parental rights are, without a doubt, a core right protected by the due process clause. So as we consider whether to amend the Constitution to add a parental rights provision, the first question that should be asked is, is this a problem that requires amending the text of the Constitution?

As I have noted, the Supreme Court has long recognized that the right of otherwise fit parents to make decisions regarding their children's upbringing has a constitutional dimension. And so over the last 90 years, the Court has issued numerous decisions that repeatedly reaffirm the fundamental nature of a fit parent's right to make decisions—decisions, *Meyer v. Nebraska, Pierce v. The Society of Sisters, Washington v. Glucksberg, Santosky v. Kramer*—and so I reject the argument made by some that the Supreme Court's decision in 2000 in *Troxel v. Granville* somehow weakened the constitutional protection of parents' rights.

In *Troxel*, the Court correctly ruled that an overly broad State law that permitted any person to petition a court for visitation rights at any time and that required the Court to grant such peti-

tion if visitation was in the best interest of the child, was unconstitutional as applied. So, again, I close by asking, what is the problem that needs to be fixed by constitutional amendment? And I will submit the rest of my opening statement in the record.

And I yield back the balance of my time.

[The prepared statement of Mr. Conyers follows:]

Statement of the Honorable John Conyers, Jr. for the Hearing on "Proposing an Amendment to the Constitution of the United States Relating to Parental Rights" Before the Subcommittee on the Constitution and Civil Justice

Tuesday, September 9, 2014, at 2:00 p.m.
2141 Rayburn House Office Building

Without question, support for the right of parents to direct the upbringing and education of their children cuts across ideological and party lines.

And, the protection of parental rights under the Constitution has not been questioned at any time by the Supreme Court. While admittedly not among the Constitution's enumerated rights, parental rights are without a doubt core rights protected by the Due Process Clause.

So as we consider whether to amend the Constitution to add a parental rights provision, we should first ask what is the problem that requires amending the text of the Constitution?

As I just noted, the Supreme Court has long recognized that the right of otherwise fit parents to make decisions regarding their children's upbringing has a constitutional dimension.

Over the last 90 years, the Court has issued numerous decisions that repeatedly reaffirmed the fundamental nature of a fit parent's right to make decisions concerning a child's upbringing.

Here is just a partial list of those decisions: *Meyer v. Nebraska, Pierce v. Society of Sisters of the Holy Names of Jesus and Mary, Washington v. Glucksburg*, and *Santosky v. Kramer.*

And, I reject the argument made by some that the Supreme Court's 2000 decision in *Troxel v. Granville* somehow weakened the Constitution's protection for parental rights.

In *Troxel*, the Court correctly ruled that an overly broad state law – that permitted *any* person to petition a court for visitation rights at *any* time, and that required the court to grant such petition if visitation was in the "best interests of the child" – was unconstitutional as applied.

So again, I ask what is the problem that needs to be fixed by a constitutional amendment?

In addition to avoiding fixing nonexistent problems, we must also be mindful of the harmful effects presented by this proposed constitutional amendment.

For example, section 2 of the proposed amendment would, among other things, specify that the constitutionally guaranteed parental right to direct a child's education includes "the right to make reasonable choices within public schools for one's child."

This broad and vague language has the potential to undermine public education by subjecting to constitutional scrutiny public school curriculums, courses, and even individual assignments to the very wide variety of moral and other values of the parents of public school students.

Under this language, public schools could simply become unmanageable, effectively ending public education's mission to give all Americans a basic education and to foster a *common* community out of our diverse society.

Finally, I have to note that with *less than three legislative weeks before another major recess*, there are other critical priorities that have not had the benefit of a hearing before this Committee.

For example, we could be holding a hearing on the civil rights, civil liberties, and law enforcement implications of the tragic events last month in Ferguson, Missouri. All of these issues fall within the Judiciary Committee's jurisdiction.

The shooting of Michael Brown raises serious questions about racial profiling by police and about the possibility of a pattern or practice of police misconduct by the Ferguson Police Department, in violation of 42 U.S.C. § 14141.

The public protests over the shooting and the police response to the protests raise questions about the constitutional rights to free speech and peaceful assembly as well as concerns about the militarization of police departments.

Additionally, comprehensive immigration reform remains to be done, notwithstanding the fact that millions of decent, hardworking people have remained in the shadows for far too long. Moreover, the Congressional Budget Office tells us we could reduce our deficit by $900 billion over 20 years by enacting such a bill.

Also, I am not aware of a single hearing being held on the problem of crushing student loan debt – totaling $1.1 trillion – and whether consumer bankruptcy law can help give deserving debtors relief from what can be a life-long burden.

These issues are worth the Committee's time, and I hope that at the end of today's hearing, we can agree on times for holding hearings on these other issues.

Mr. FRANKS. I would thank the gentleman.

Without objection, other Members' opening statements will be made part of the record.

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

Welcome to the Committee, sir.

Our second witness, Professor Catherine Ross, is a member of the George Washington Law School faculty. Professor Ross has been a visiting professor at the University of Pennsylvania Law School where she also was a senior legal consultant to the Field center in Children's policy practice and research, and at Boston College Law School where she held joint appointments in Reed Morris—the School of Education and the History Department there. Professor Ross also serves on the editorial board of the Family's Courts Review and has served on the editorial board of the Family Law Quarterly.

Our third witness is Wendy Wright. Ms. Wright has been an active pro-life member and committed to family issues for more than 25 years on the international and national and local level. She has advised international and congressional leaders, testified in Congress, and State legislatures. She writes, speaks and trains on current issues for a popular audience. Her work has influenced landmark rulings on freedom of speech in the U.S. Supreme Court and several other U.S. State courts.

Now each of the witnesses' written statements will be entered into the record in its entirety. I would ask each witness to summarize his or her testimony in 5 minutes or less. To help you stay within that time, there is a timing light in front of you. The light will switch from green to yellow, indicating that you have 1 minute to conclude your testimony. When the light turns red, it indicates that the witness's 5 minutes have expired. Before I recognize the witnesses, it is the tradition of this Subcommittee that they be sworn, so if you'd please stand to be sworn.

[Witnesses sworn.]

Mr. FRANKS. Let the record reflect that the witnesses answered in the affirmative.

And I would now recognize our first witness, Mr. Farris. Sir, please make sure your microphone is on before you start.

TESTIMONY OF MICHAEL P. FARRIS, JD, LLM, CHAIRMAN, HOME SCHOOL LEGAL DEFENSE ASSOCIATION, AND CHANCELLOR, PATRICK HENRY COLLEGE

Mr. FARRIS. Mr. Chairman, Members of the Committee, thank you so much for the opportunity to be able to testify today, and thank you for holding this hearing. This hearing is called to answer one central question: Should the traditional right of parents to direct the upbringing of their children be protected in the actual text of the Constitution?

There really are only three possible answers. Some think that the current law which treats parental rights as an implied right in our Constitution is sufficient to protect appropriate parental rights as a fundamental right. Second, another group opposes the very concept of protecting parental rights as a fundamental liberty interest. And, third, the proponents of the amendment believe that there are sufficient present and foreseeable threats to parental rights that it has become time to adopt a specific amendment.

Now every Member of Congress that I have ever talked to on this subject has affirmed the core idea that parental rights should be protected as a fundamental right, and both the statements of Representative Cohen and Representative Conyers today were consistent with that, that we all believe that parental rights are and should be a fundamental right.

If it is simply a drafting issue, I would suggest to Mr. Cohen that we probably could find political common ground and get to the correct drafting if there were drafting issues.

But the fundamental issue is, is it time to adopt a specific amendment? I would like to offer three lines of evidence that it is, indeed, the time to place parental rights into the actual text of the Constitution if it is going to be preserved as a fundamental right.

The first line of evidence is that the Nation is moving in a practical way in a direction that is absolutely opposed to parental rights. Our organization has accumulated hundreds of stories from every State in the Nation and from virtually every congressional district where parents are being told that they may no longer accompany their children for routine medical treatments.

For example: Representative Franks, in your district, Candace C. from Fort Mohave, Arizona, tells us that she went to dentist after dentist in her community before she finally found one who would allow her to accompany her in for the treatment.

Sierra H. from Wooster, Ohio, in Representative Renacci's district told us that her pediatrician questioned her 12-year-old son separately from her, despite the fact that there was no basis for believing that this mother was engaged in improper behavior toward the son. It turns out that this physician does this with every child.

Ted from Stateline, Mississippi, was prevented from accompanying his 13-year-old daughter into the dentist's office. As is typical in these cases, the doctor told the dad that the government regulations now require children to be separated from their children during treatment.

We are hearing this all over the country in virtually every congressional district and with all kinds of medical providers. Whether they are dentists or pediatricians or physical therapists, it really doesn't seem to make any difference. The governmental command of separating children from parents is becoming epidemic.

Now, this crisis has found its way into the courts in the area of psychotherapy with the California and New Jersey laws that prevent parents, whether their child is willing or not, to seek therapy for the child that is designed to assist a child who is experiencing same sex attractions and either the parents or the child want to avoid those attractions. Now, we have not reached the point as a Nation where such therapy is banned for adults. If an adult wants that kind of therapy, they can get it, so it is not that level of harm.

So the question is, who decides for a child whether or not this therapy is good or bad? Well, in New Jersey and California, the government has decided to take the place of the parent.

The second line of evidence is that although the Supreme Court, if you read it very closely as a number of lower courts have done, they disagree with the contention that the Court has a clear signal that parental rights are fundamental. The Fifth Circuit in the case I site, *Littlefield v. Forney School District*, concluded that it is not a fundamental right. You do not get the test that goes with fundamental rights analysis, and that decision has been followed by a district court in Nevada, Federal District Court in Nevada, and another district court in New Jersey.

The Court of Appeals California in a home school case that I argued before the Court of Appeals held that the Federal courts were out of sync with the idea that fundamental rights were to be accorded to parental rights, but based on the California precedent, they gave us the victory that we needed in that case, but the national standard is diminishing.

Finally, we hear from witnesses like my colleague here today, Catherine Ross, who argues that parental rights should not be protected, even in the area of transmitting your own values to your own children. And I will have more to say after she testifies, perhaps in questioning. My time is up. Thank you very much.

Mr. FRANKS. Thank you, Mr. Farris.

[The prepared statement of Mr. Farris follows:]

The United States House of Representatives

Committee on the Judiciary

Constitution Subcommittee

The Parental Rights Amendment

September 9, 2014

Testimony of

Michael P. Farris, JD, LLM

Chairman, Home School Legal Defense Association

Chancellor, Patrick Henry College

This hearing is called to answer one central question: Should the traditional right of parents to direct the upbringing of their children be protected in the actual text of the Constitution?

There are only three possible answers to this question:

1. Some think that the current law which treats parental rights as an implied right is sufficient to protect appropriate parental rights as a fundamental right.
2. Others oppose the very concept of protecting parental rights as a fundamental liberty interest.
3. The proponents of the Amendment believe that there are sufficient present or foreseeable threats to parental rights that it has become time to adopt a specific amendment.

Every member of Congress that I have ever talked to on this subject has affirmed the core idea that parental rights should be protected as a fundamental right. Some believe that current protections are adequate to ensure proper protections of parental rights. Others support the PRA on the belief that it is now time to protect this fundamental liberty.

I would like to offer three lines of evidence that indeed the time has come to place parental rights into the actual text of the Constitution if it is to be preserved as a fundamental right.

The Supreme Court has described a fundamental right as one which is "implicit in the concept of ordered liberty" and which is "deeply rooted in this Nation's history and tradition." *Twining v. New Jersey,* 211 U.S. 78, 106 (1908); *Palko v. Connecticut,* 302 U.S. 319, 325 (1937).

Parental rights clearly meet this standard. It must be remembered that the right in this context is the right to make decisions regarding the upbringing of a child. Who should have the primary right?

Parental rights are not and should not be accorded absolute protection, but as a fundamental right the ability of a parent to make decisions for their own children should be prior to

governmental power in two ways. Parental rights should be prior both in time and in authority to that of the government.

Since any constitutional right is designed only to restrict governmental power, the issues we face today here can be boiled down to the question: When should parental authority to make decisions for their children be superior to the authority of the government?

If parental rights are fundamental in character, then the answer is that parental rights should be superior to the power of the government unless and until the government demonstrates that it has a compelling interest and it is pursuing that interest in the least restrictive manner.

If parental rights are non-fundamental in character, then the government's authority becomes prior to that of parents. The parents would have the burden of demonstrating that the government's assertion of authority over their children lacks a rational relationship to a legitimate state interest.

What kind of nation do we want to be: A nation where parents have presumptive decision-making authority for their children or a nation which places governmental power in first place in a child's life?

We are rapidly moving to become a nation where the government comes first and parents come second.

There are three lines of proof that I offer to demonstrate that our nation is rapidly moving in the wrong direction.

First, we have accumulated hundreds of stories from every state in the nation and from most congressional districts where parents are being told that they may no longer accompany their children for routine medical treatments.

Representative Franks, Candace C. from Fort Mohave, Arizona, tells us that she had dentist after dentist in her community tell her that she was not allowed to accompany her daughter during dental treatment.

Sara H., from Wooster, Ohio, in Representative Renacci's district, told us that her pediatrician questioned her 12 year-old son separately from her despite the fact that there was no basis for believing that the mother was engaged in improper behavior toward her son. This routine was followed for every child.

Ted H. from State Line, Mississippi in Representative Palazzo's district was prevented from accompanying his 13 year-old daughter in the dentist's office. As is typical in these cases, the doctor told the dad that government regulations now require children to be separated from their parents during treatment.

We have similar stories from the districts of Representative Perlmutter in Colorado, Representative Michaud in Main, Representative Camp in Michigan, Representative Rokita in Indiana, and numerous other districts.

Parents all over the nation are being told that federal law prohibits them from accompanying their children during visits with pediatricians, dentists, physical therapists, and many other medical providers.

The governmental separation of children and parents is becoming epidemic.

This crisis has reached a level that would have been unimaginable just a few years ago. California and New Jersey have prohibited parents from seeking therapy for their children that is designed to assist a child who is experiencing same-sex attractions.

We have not reached the point as a nation where such therapy is prohibited for adults. So, it cannot be argued that the government has legitimately concluded that such therapy is always dangerous or inappropriate. So the only issue is who decides whether such therapy should be given to children.

Two states have concluded that the government should make this decision and the federal courts have concluded that these laws do not violate parent's constitutional rights.

The second line of evidence to be considered is the growing confusion or rejection of parental rights as a fundamental right subsequent to the Supreme Court's decision in *Troxel.*

Two important cases illustrate the problem. In *Littlefield v. Forney Ind. School District,* 108 F.Supp.2d 681 (N.D. Tex. 2000), the court undertook a thorough review of the constitutional standards for evaluating parental rights cases. This court concluded (in a case involving a dress code in a public school) that the correct constitutional standard was to treat this claim of parental rights as a non-fundamental right.

This decision was upheld by the Fifth Circuit, 268 F.3d 275 (5th Cir. 2001), in an opinion that expressly praised the thoroughness and accuracy of the District Court's analysis of parent's fundamental rights.

The outcome of this particular case may well have been the same even under a fundamental rights standard. This is because it is doubtful that parental rights to direct the upbringing of a child are substantially burdened by a public school dress code.

Rules from cases are not limited to their facts. When the Fifth Circuit affirms a decision that says that parental rights are often non-fundamental in character, this decision will be used in all of these medical cases we have cited and in many other contexts.

Federal District Courts in Nevada and New Jersey have cited and followed the Fifth Circuit's rule that parental rights should be evaluated under rational basis analysis generally employed for non-fundamental rights. *Jacobs v. Clark County School Dist.,* 373 F.Supp.2d 1162, 1193-94 (D. Nev. 2005); *M.G. v. Crisfield,* 2009 WL 2920268, *6 (D. N.J. 2009).

Similarly, the California Court of Appeal, in a case that I argued, held that the Supreme Court's standard for parental rights does not lead to the conclusion that parental rights are a fundamental right. But citing decisions of the California Supreme Court, held that in that state parental rights would be treated as fundamental.

Jonathan L. v. Superior Court, 165 Cal.App.4th 1074, 81 Cal.Rptr.3d 571, (Cal.App. 2 Dist. 2008).

What these decisions have in common is this: When both state and federal courts have reviewed the Supreme Court's standards on parental rights, they have concluded that parental rights are not to be protected by the strict judicial scrutiny that normally protects any fundamental right.

In the last hearing before this Committee, you heard from Professor Martin Guggenheim from New York University who strongly believes that parental rights should be treated as a fundamental liberty, but took the position that the time was not yet ripe for such an amendment.

Today, you will hear a complete different viewpoint from Professor Catherine Ross from George Washington University. I recently published an article in the Peabody Journal—a leading peer-reviewed academic journal on educational issues in which I responded to the writings of Professor Ross and a handful of other scholars who share her viewpoint.

Professor Ross rejects the notion of parental rights as a fundamental liberty interest and proposes stringent limitations on the ability of parents to teach their own children their religious and moral views—particularly in the context of homeschooling.

The clash between Professor Ross's viewpoint and my own could not be more stark. I have appended to my testimony two articles—one by Professor Ross and my responsive article from the Peabody Journal.

Here is the core of her argument in that article.

> Many liberal political theorists argue, however, that there are limits to tolerance. In order for the norm of tolerance to survive across generations, society need not and should not tolerate the inculcation of absolutist views that undermine toleration of difference. Respect for difference should not be confused with approval for approaches that would splinter us into countless

> warring groups. Hence an argument that tolerance for diverse views and values is a foundational principle does not conflict with the notion that the state can and should limit the ability of intolerant homeschoolers to inculcate hostility to difference in their children—at least during the portion of the day they claim to devote to satisfying the compulsory schooling requirement.
>
> —Catherine Ross, Professor of Law, George Washington University[1]

Professor Ross subscribes to a heretofore-undiscovered "constitutional norm of tolerance."[2] "[D]emocracy relies on citizens who share core values, including tolerance for diversity. When parents reject these values, the state's best opportunity to introduce them lies in formal education."[3] "[F]avoring licensed schools over homeschooling promotes the state's normative goals in exposing children to constitutional values."[4] She finds norms requiring both the practice of tolerance and the mandated teaching of tolerance.

Every person in this country should favor a government that practices toleration of religious viewpoints. Actually, tolerance is a cheap form of religious liberty which should be the actual goal.

But a nation that uses governmental power to force citizens to adhere to some notion that private people must believe that all religious views are equally valid has crossed the line into blatant philosophical tyranny.

We see the evidence of philosophical tyranny not only in the writings of Professor Ross, but in the laws of New Jersey and California which are being affirmed by the federal courts.

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[1] Catherine Ross (Professor of Law, The George Washington University Law School), "Fundamentalist Challenges to Core Democratic Values: Exit and Homeschooling," 18 Wm. & Mary Bill Rts J. 991, 1005 (2010).
[2] 18 Wm. & Mary Bill Rts. J. at 991.
[3] *Id. at* 1013.
[4] *Id.* at 1014.

Does this nation believe that parents should raise children or are children really the creatures of the state?

There is only one way to settle this question once and for all. The time is upon us to adopt the Parental Rights Amendment.

Mr. FRANKS. And I now recognize Ms. Ross for 5 minutes, and make sure if you would that your microphone is on.

TESTIMONY OF CATHERINE ROSS, PROFESSOR OF LAW, GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

Ms. ROSS. Mr. Chairman, and Members of the Subcommittee, thank you for inviting me to appear before you today.

My written submission adequately covers the two major points. There is no urgent need—in fact, there is no need at all—for this amendment. And I want you to remember that the proponents' reassurances about their intention in drafting the text do not change the reality that the amendment threatens to transform several areas of constitutional law, causing grave harm.

Before beginning, let me briefly respond to some of Chancellor Farris' comments. His written submission mischaracterizes my position on parental rights, home schooling, and tolerance, and I will be happy to take questions. I don't want to take a detour through that now, but he also just gravely mischaracterized my position in saying that I don't believe parental rights should be protected.

I have never said that, and I have an extensive body of published work in this area.

The Supreme Court has always given parental rights the highest deference, as the many cases that I discussed and that some of the speakers earlier have talked about. I fully support parental rights, and I agree and have argued that they have a constitutional dimension, and so the amendment isn't needed.

But like all fundamental rights, parental rights are not absolute. Courts must also consider the states' substantial and, I would argue usually compelling, interests in the safety, health and education of children and the sometimes countervailing constitutional rights that children possess on their own as the Supreme Court has held in the areas of contraception, abortion, and speech.

Parental rights are not under attack. They are not in jeopardy. And no matter how often Mr. Farris says he is providing evidence, he has not provided any evidence. My statement thoroughly rebuts the 24 cases on which he relied in 2012. And his stories today are nothing more than hearsay attributable to unnamed people and often double hearsay, stories he has heard from someone about someone else.

And I must say, if doctors don't understand the law, someone should tell them what it is because there is no Federal rule or statute that says that children must be seen apart from their parents, though it is the best pediatric practice, as the professional literature reveals. To the extent these are State laws or even congressional laws, use the legislative process. Have the statutes and regs changed. Don't amend the Constitution when it is not necessary.

Parents do have rights that are first in time but not always first in authority. When parents use the public schools, they have to follow the schools' rules. Their choice under *Pierce* is to satisfy compulsory education elsewhere, in schools that, as *Meyer* and *Pierce* both stated very expressly, are regulated by the State and are subject to that regulation.

I agree there is a problem about who this amendment would protect. There are a lot of different kinds of parents, but most impor-

tantly, this amendment threatens our *parens patriae* traditions in which the state has its own interests in making sure that the next generation of citizens are brought up safely, are kept healthy, and receive the education that our citizens need. I don't think that those kinds of statutes, regulations, and practices would succumb if this amendment were passed, but I would bet my house that the proponents and many others inspired by this amendment would challenge our entire child welfare system just as the home schoolers maintain repeatedly and go to court on the question of whether they should be subjected to any form of state supervision or regulation, including even having to say they have children at home and they are teaching them.

Thank you. I look forward to your questions.

Mr. FRANKS. Thank you.

[The prepared statement of Ms. Ross follows:]

STATEMENT OF CATHERINE J. ROSS

Professor of Law, George Washington University Law School

Presented to the House of Representatives Committee on the Judiciary,
Subcommittee on the Constitution and Civil Justice

Hearing on H.J. Res. 50, "Proposing an amendment to the Constitution of the United States relating to parental rights"

September 9, 2014

Mr. Chairman and Members of the Subcommittee:

Thank you for giving me the opportunity to testify in opposition to H.J. Res. 50, a proposed constitutional amendment (the "Amendment") relating to parental rights. The Amendment raises three primary concerns: (1) to the extent the Amendment would modify the Constitution to preserve the understanding of liberty that has been in place for nearly a century, it is unnecessary; (2) the Amendment in fact contains language that threatens to transform the law in several respects with potentially harmful results; and (3) prudence indicates that the Constitution should never be amended absent an urgent need, and there is none here.

Let me begin with relevant background about my expertise. I am a Professor of Law at George Washington University, where I have taught since 1996; I have been a visiting professor at the University of Pennsylvania, Boston College, and St. John's. My specialties are families, children and constitutional law. I have published more than 50 articles and book chapters. I have also published several books, including a leading legal text, Contemporary Family Law (West), going into its fourth edition, which I co-author, and in which I have primary responsibility for the two chapters on child custody and the sections of the book that discuss substantive due process and parental rights. My forthcoming book on the First Amendment in public schools -- begun when I was a Member of the School of Social Science at the Institute for Advanced Study in Princeton -- will be published by Harvard University Press in 2015. I hold a Ph.D. as well as a J.D., and before I was a lawyer I was on the faculty of the Yale University Child Study Center at the Yale Medical School where I was part of a research and consulting group on state intervention into families, which regularly urged government restraint. I have participated in and consulted for numerous groups engaged with government policies on education as well as on child abuse and neglect. I am a former chair and co-chair of the American Bar Association's Steering Committee on the Unmet Legal Needs of Children.

The Supreme Court has unwaveringly protected parental rights and there is no evidence that parental rights are being eroded.

The Supreme Court has been steadfast in giving parental rights the highest level of protection since it first considered the issue in the 1920s. The primary purpose of the Bill of Rights was to safeguard the rights of individuals against excessive government power. Although the Constitution never mentions families, parents or children, the First Amendment protects minority beliefs, while the Ninth Amendment expressly protects the unenumerated rights "retained by the people." The Fourteenth Amendment is the source of substantive due process rights, which are the fundamental liberties essential to ordered liberty, or, in another formulation, that are part of our history and tradition.

In a line of cases beginning in 1923, the Supreme Court began to consider the relationship among parents, children and the state. In *Meyer* v. *Nebraska*, a teacher of German in a Lutheran independent school challenged a Nebraska statute that barred the teaching of foreign languages before children reached a certain age. The Court overturned the statute because it violated the Due Process Clause of the Fourteenth Amendment. "Without doubt," the Court opined, the liberty guaranteed by the Fourteenth Amendment includes: "the right to . . . marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[1] The Court indicated that our values are clarified when we compare ourselves to other civilizations endorsed by "men of great genius," like ancient Sparta or Plato's ideal Republic, both of which removed children from their parents in order to "submerge the individual." Such ideas are "wholly different from those upon which our institutions rest," the Court underscored, and could not be imposed here "without doing violence to both letter and spirit of our Constitution."[2]

Two years later, in *Pierce* v. *Society of Sisters*, the Court reiterated the principles it had set out in *Meyer*. *Pierce* overturned a state statute that provided that parents would not be in compliance with compulsory education laws unless they sent their children to public schools. The Court held that under *Meyer*, the statute "interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." It continued: "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children."[3] Under *Pierce*, parents have the right to choose whether to send their children to public schools, private schools, or satisfy compulsory education laws in some other manner such as home schooling. The

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[1] *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923).

[2] *Meyer*, 262 U.S. at 401-402.

[3] *Pierce* v. *Society of Sisters*, 268 U.S. 310, 535 (1925).

Court specifically noted that neither *Meyer* nor *Pierce* raised any challenge to the state's authority to mandate compulsory education or to regulate and license independent schools.[4]

The Court built on these foundational cases in a series of later opinions, all of which reiterated that parents have a constitutionally protected liberty interest in raising their children according to their own values and judgment. Even where the Court found that the state had a public interest sufficient to overrule parental judgment (in enforcing child labor laws where a young girl was selling a Jehovah's Witness publication on the streets at night, albeit in the company of her guardian), the Court reiterated: "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."[5] "[T]hese decisions," the Court emphasized, "have respected the private realm of family life which the state cannot enter."[6]

Two other lines of cases considered questions that complement the Court's treatment of parental rights as fundamental. The first group of decisions examines who counts as a parent, and whether biology is determinative. The second (sometimes overlapping) group focuses on the procedural protections that must be accorded parents before the state can terminate their parental rights.

In *Stanley* v. *Ilinois*, an unmarried father of three children, who had primarily lived with the children and their mother since they were born, lost custody of the children after their mother died, without an opportunity for a hearing. The state of Illinois imposed an irrebuttable presumption that unmarried fathers did not participate in raising their children. The Supreme Court ruled that Mr. Stanley was entitled to a hearing, and that the statute unconstitutionally deprived him of the custody of his children without any showing that he was unfit to parent them.[7] Subsequent cases held that unmarried biological fathers who did not live with their children but had grasped the opportunity biology offers to establish a substantial relationship with their children preserve their Fourteenth Amendment due process liberty interest as parents.[8]

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[4] *Pierce* 268 U.S. *at* 534; *Meyer*, 262 U.S. at 402.

[5] *Prince* v. Massachusetts, 321 U.S. 158, 166 (1944) (*citing Pierce*).

[6] *Id.*

[7] *Stanley* v. *Illinois*, 405 U.S. 645 (1972).

[8] *Quilloin* v. Walcott, 434 U.S. 246 (1978); *Caban* v. *Mohammnd*, 441 U.S. 380 (1979); *Lehr* v. *Robertson*, 463 U.S. 248 (1983).

The second line of cases involves the process that is due when the state pursues the ultimate intervention into families: termination of parental rights in response to severe neglect or child abuse. These cases also demonstrate the constitutional imperatives protecting parents' rights in their children. In *Santosky* v. *Kramer* the Court held that the substantive liberty interest in parenting "does not evaporate simply because [the parents] have not been model parents or have temporarily lost the custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life."[9] Justice in cases involving termination of parental rights requires that the state meet a heightened evidentiary burden.[10]

In 2000 the Supreme Court decided *Troxel* v. *Granville*, a case involving a "breathtakingly broad" Washington statute respecting the standing of third parties (including grandparents) to initiate litigation "at any time" to seek visitation.[11] In 2012, Chairman Franks opened the hearing into a substantially similar proposal to amend the Constitution to protect parental rights by saying: "the integrity of parental rights was threatened . . . when the U.S. Supreme Court decided *Troxel* . . . " even though a four-person plurality "described parental rights as a fundamental [sic.], historically."[12] But *Troxel* did not encourage legislatures or lower courts to abridge parental rights — far from it.

The *Troxel* plurality made the strongest, most focused statement respecting the constitutional status of parental rights in the Court's history. Justice O'Connor's plurality opinion reaffirming nearly a century of decisions in which the Court recognized the fundamental nature of parental rights merits reproduction here:

> The 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. More than 75 years ago, in Meyer v. Nebraska, 262 U.S. 390, 399 (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

[9] *Santosky* v. *Kramer*, 455 U.S. 745, 753 (1982).

[10] *Santosky*, 455 U.S. 745.

[11] *Troxel* v. *Granville*, 530 U.S. 57, 61(2000) (O'Connor J., plurality opinion).

[12] Hearing before the Subcommittee on the Constitution of the Committee on the Judiciary of the House of Representatives on H.J. Res. 110, 112th Cong., 2d Sess. (July 18, 2012) Serial No. 112-138 (Washington: 2012) at 2 (hereinafter "2012 Hearing").

> 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 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 [521 U.S.] at 720 [1997]("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)).[13]

To place the principle beyond dispute, Justice O'Connor summed up: "**In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental**

[13] *Id.* at 65-66 (O'Connor, J. plurality opinion).

right of parents to make decisions concerning the care, custody, and control of their children."[14]

It is true that two sitting justices (Scalia and Thomas) have challenged the basis of parental rights doctrine.[15] But if the reservations about precedent of two justices (or even three or four justices) were deemed to justify a constitutional amendment "just in case" they were to garner a majority at some future date, the Constitution would be the size of a major metropolitan phone book instead of the pocket size pamphlet law professors, and, I daresay, some members of Congress, carry.

With all due respect, *Troxel* does not appear to have been the precipitating factor that motivated the Amendment, though it may have fostered a strategic change from seeking a federal statute protecting parental rights to seeking to amend the founding document. The campaign for federal legislation to entrench parents' rights (and a parallel campaign for legislation and constitutional amendments in the states) predated *Troxel*. As some members of this Committee may recall, Michael Farris (who appears as a witness for the majority today), the founder and former president of the Home School Legal Defense Association, as well as the founder of parentalrights.org, was the primary drafter and proponent of the Parental Rights and Responsibilities Act, introduced in the House and the Senate in 1995, which substantially resembled the current proposed Amendment. That act was not reported out of committee in either chamber. At that time -- even before *Troxel* -- proponents argued that the legislation was intended to codify the holding in *Pierce.*[16] In 2012, Chancellor Farris submitted to this Committee a list of 24 cases decided over the course of a decade, which he claimed showed that "parental rights are under assault" in the wake of *Troxel.*[17] The cases do not support that proposition. This Committee is entitled to understand more about those 24 cases.

Most of the cases do not involve the subject matter of the Amendment, which focuses on conflicts between the government and families: instead, the bulk of the 24 cases involve intra-family disputes over custody and visitation. Moreover, many of them stand for the principle that parents have fundamental rights to the custody and control of their children. To the extent that the 24 cases involve facts that reveal government excesses (whether by administrative officials or lower court judges who are later reversed), they generally demonstrate that appellate courts are performing as we expect them to — reversing erroneous lower court opinions and

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[14] *Id.* at 66 (emphasis added).

[15] *Troxel,* 530 U.S. at 79 (Thomas, J., *concurring*); *Ibid.* at 91 (Scalia, J., *dissenting*).

[16] Joan Hellwege, *Parents Seek Increased Control Over Children's Lives in Legislatures,* Courts, 35 Trial 12 (May 1999).

[17] 2012 Hearing at 8.

protecting parental rights under the Fourteenth Amendment from government encroachment.

The 24 cases fall into three analytically distinct categories. First, nine (9) cases involve private disputes about custody or visitation between two parties that assert legal claims to parenthood, or state statutes governing such private disputes.[18] Second, seven (7) cases involve grandparent visitation under state statutes.[19] Third, only the eight (8) remaining cases arguably fall within the scope of the proposed Amendment because they involve the balance of authority between parents and the state. Thus, in a decade, less than one (1) case each year arguably implicated the

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[18] *Cannon* v. *Cannon*, 280 S.W.3d 79 (Mo. 2009) (supervised visitation for felons under state statute); *Weigand* v. *Edwards*, 296 S.W.3d 453 (Mo. 2009) (statute governing petition for modification of custody by parents in arrears on child support); *In re Guardianship of Victoria R.*, 201 P.3d 169 (N.M. Ct. App. 2008) (long term substitute caretakers found to be "psychological parents," requiring gradual transition and visits on child's return to biological parent); *In re Reese*, 227 P.3d 900 (Colo. Ct. App. 2010) (parent is entitled to "special weight" in allocation of parenting time compared to de facto parents); *Bethany* v. *Jones*, 2011 Ark. 67 (Ark. 2011) (in visitation dispute, non-biological parent in unmarried couple stood *in loco parentis* to the child); *Williams* v. *Williams*, 50 P.3d 194 (N.M. Ct. App. 2002) (grandparents who stood in loco parentis after caring for the child for most of his life entitled to visits even over parent's objection, just as a biological parent would be); *State* v. *Wooden*, 184 Or. App. 537 (Or. App. 537 2002) (reversing award custody to grandparents who had cared for child for most her life after her mother was murdered by her step-father, and awarding custody to biological father); *McDermott* v. *Dougherty*, 869 A.2d 751 (Md. 2005) (reversing award of custody to maternal grandparents who had cared for young boy at father's initial request, finding the father "not unfit" and no exceptional circumstances that would justify awarding custody to third party); *In re Marriage of Winczewski*, 72 P.3d 1012 (Or. Ct. App. 2003) (affirming award of custody to grandparents where the mother was unable to care adequately for the children, and it would be detrimental to the children to live with their mother).

[19] These are pure grandparent visitation cases, in which there is no claim that the grandparents have functioned as parents. *In re Adoption of C.A.*, 137 P.3d 318 (Colo. 2006) (court must apply presumption favoring parent's decision in grandparent visitation cases; rebuttal of presumption requires clear and convincing evidence, and a showing that visits will serve child's best interests); *Barker* v. *Barker*, 98 S.W. 3d 532 (Mo. 2003) (affirming award of visitation where denial was patently unreasonable, based on grandparents' siding with father's brother in a dispute); *Santi* v. *Santi*, 633 N.W. 312 (Iowa 2001), (applying strict scrutiny to a grandparent visitation statute and overturning the statute for failing to require a threshold finding of parental unfitness); *Jackson* v. *Tangreen*, 18 P.3d 100 (Ariz Ct. App. 2000) (upholding a grandparent visitation statute permitting visitation after a step-parent adoption terminates biological ties, courts must look at parent's motives and the "historical relationship."); *Blakely* v. *Blakely*, 83 S.W.3d 537 (Mo. 2002) (affirming award of modest visitation of eight hours each year); *In re Custody of C.M.*, 74 P.3d 342 (Colo. Ct. App. 2002) (applying strict scrutiny and vacating visitation order); *Crofton* v. *Gibson*, 752 N.E. 2d 78 (Ind. Ct. App. 2001) (finding a compelling state interest in preserving an existing close relationship with parents of the non-custodial parent following divorce).

interests that proponents insist need to be protected by means of a constitutional amendment. As I will show, in each of these cases, the state had an undisputed and, at a minimum, a substantial interest in the subject matter of the disputed authority. In some, courts demanded the government demonstrate a compelling interest, and found that it did, while in others the government would likely have been able to meet that standard though it was not required to.[20]

With respect to the first group -- intra-family disputes about custody and visitation -- trial courts must initially determine which adults are in a position to assert parental rights. This is not a simple matter, because in addition to biological parents, legal guardians and adoptive parents ("legal parents"), the law in most jurisdictions recognizes various categories of equitable parents — related or unrelated adults who have functioned as day-to-day caretakers for a significant period of time with the consent of the legal parent. If the court recognizes the claims of these adults to parental status, they stand in the same shoes as other legal parents when the court considers disputes over custody and visitation. There is no constitutional distinction among biological, adoptive, equitable (or de facto) parents

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[20] *Doe* v. *Heck*, 327 F.3d 492 (7th Cir. 2003) (holding child welfare investigators infringed on protected rights when they interviewed an 11-year-old about corporal punishment at a private school without a warrant, holding "the fundamental right of parents to discipline their children includes the right to delegate that right to private school administrators."); *Nicholson* v. *Williams*, 203 F. Supp.2d 153 (E.D. N. Y. 2002), **and** *Nicholson* v. *Scoppetta*, 3 N.Y.3d 357 (2004) (not cited in 2012 Hearing, Farris Appendix) (a class action suit, leading to a huge victory for parents' rights, holding that child welfare officials violated the rights of mothers who were domestic violence victims by routinely presuming the mothers allowed children to observe the violence, thus placing the children at risk of harm, and removing the children from their mothers based on that presumption); *State Dept. of Human Resources*, v. *A.K.* 851 So.2d 1 (Ala. Ct. App. 2002) (reversing decision not to terminate parental rights of three siblings who had been in foster care for over six years where clear and convincing evidence showed statutory grounds for termination, specifically that mother persistently relapsed after drug rehabilitation, and that father was using illegal drugs again shortly after release from prison); *Laebaert ex rel. Laebaert* v. *Harrington*, 193 F. Supp. 2d 491 (D. Conn. 2002) (consistent with decisions before *Troxel*, parents have no constitutional right to remove child from a required health education course or to "veto" courses or topics -- the remedy provided by *Pierce* is to remove child from public school); *Littlefield* v. *Forney Independent Sch. Dist.*, 268 F.3d 275 (5th Cir. 2001) (a school uniform policy does not intrude on parents' fundamental right to rear their children); *Price* v. *New York City Bd. of Educ.*, 51 A.D.3d 275 (A.D. N.Y. 2008 (school district policy banning cell phones and similar devices is delegated to school administrators, and even if subject to judicial review, did not interfere with parental rights because parents could communicate with their children before and after school); *Hensler* v. *City of Davenport*, 790 N.W.2d 569 (Iowa 2010) (a parental responsihility ordinance holding parents accountable for delinquent acts of minor children only "minimally" impinged on parental rights to direct the upbringing of their children and thus did not require strict scrutiny); *Douglas County* v. *Anaya*, 674 N.W.2d 601 (Neb. 2005) (finding a compelling interest in a state requirement that children be tested for metabolic diseases even when parents expressed religious objections to a skin prick to draw blood).

and any other adult accorded parental standing. As the Supreme Court of Maryland explained in *McDermott* v. *Daugherty*, a case on Chancellor Farris's list: "in disputes between fit natural parents, each of whom has equal constitutional rights to parent" no constitutional preference arises. In states that recognize "third parties who have, in effect, become parents," the court continued, "the case is considered according to the standards that apply between natural parents."[21]

Two of the nine cases in this first group involve challenges to state requirements bearing on the support and safety of children at the heart of child custody proceedings between parents. I cannot imagine that the proponents of the Amendment would have the temerity to argue that the state lacks a compelling interest in requiring supervised visits for a father who had been convicted of the rape and sodomy of his step-daughter (*Cannon*) or in making fulfillment of child support obligations a prerequisite for a non-custodial parent to seek residential custody (*Weigand*).

In short, adoption of the Amendment would have no bearing on any of the cases summarized in footnote 18. Even if the Amendment bore on those nine cases in any way, which it does not, many of the decisions in fact protect biological parents' rights to their children, while others protect the rights of adults that court has held are entitled to be treated as parents. This is hardly the stuff that calls for a constitutional amendment.

In the second group of cases -- the grandparent visitation cases that most closely resemble *Troxel* -- three of the seven decisions expressly apply strict scrutiny or hold that the state has a compelling interest in ordering visits (*Santi, Custody of C.M, and Crofton*). In another decision, the court imposed a presumption supporting the parent's decision, while another requires trial courts to give weight to the parent's preferences (*Adoption of C.A.*,and *Jackson*). And in still one more of the seven cases, the trial court imposed what the appellate judges concluded was a de minimis burden on parental authority: a total of eight hours of visitation *a year* (*Blakely*). Finally, in *Barker* the court ordered visits because denial of visitation was unreasonable and done to retaliate against the parent's sibling, not based on the grandparents' own acts; perhaps the *Barker* court went too far, but that one case hardly seems to bear the weight of justifying a constitutional amendment.

This brings us to the third group of eight cases — involving conflict between parents and the state, and arguably governed by the Amendment. In one of the decisions, *Hensler* v. *City* of *Davenport*, the Supreme Court of Iowa concluded that strict scrutiny is only triggered in parental rights cases when the state "directly and substantially intrude[s]" on a parent's "decision-making authority over her child."[22]

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[21] *McDermott*, 869 A. 2d at 772.

[22] *Hensler* v. *City of Davenport*, 790 N.W.2d at 583.

Such direct incursions, implicating fundamental rights, the court explained, have a common thread: "'the state intervened and substituted its decision making for that of the parents."[23] Precisely when state action amounts to substituted decision making remains open to debate, leading to disputes about: (i) the level of control public schools may assert over children during the school day (as in three of the cases, centering on curricular requirements, cell phone use and school uniforms) (*Laebaert, Price,* and *Littlefield*); (ii) generally applicable medical requirements (*Anaya*); and (iii) whether cities may issue citations to parents whose children break the law (*Hessler*). In the remaining three cases in this group, the courts held that child welfare officials violated parents' fundamental rights in two cases (*Doe* and *Nicholson*), and ordered parental rights terminated where children had lingered in foster care for more than six years and both parents persistently used illegal drugs (*A.K*). Imposing a strict scrutiny standard would not prevent this sort of recurrent disagreement from reaching the courts, nor would it likely change the outcome in the eight cases discussed here.

Proponents of the Amendment also hinge their argument on the proposition that *all* fundamental rights require strict scrutiny and that *Troxel* muddied the waters on what standard applies to parental rights.[24] But it was not clear that strict scrutiny applied to parents' rights before *Troxel.* In a series of cases involving substantive due process rights found to be fundamental, the Supreme Court has acknowledged strict scrutiny review, but has not needed to apply it where the Court found that the challenged regulations could not survive less demanding analysis.[25] Similarly, in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, the Supreme Court continued to recognize a woman's fundamental liberty interest in deciding whether to terminate an unwanted pregnancy within the legal timeframe, but crafted a unique test for determining when the state unconstitutionally intruded on that right (the "undue burden" test) that remains in place today.[26] If the Amendment were to be adopted, analytical consistency would seem to demand that strict scrutiny apply to other substantive due process rights as well, including all reproductive rights and the right to choose intimate partners.

The current jurisprudence recognizes the primacy of parental rights, but no rights are absolute. Statutes and case law delicately balance the rights of parents against the state's *parens patriae* obligations to protect the vulnerable and the right of

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[23] *Id.* at 582 (quoting *Dutkiewicz* v. *Dutkiewicz*, 289 Conn. 362, 957 A.2d 821, 833 (Ct. 2008) (summarizing U.S. Supreme Court decisions).

[24] 2012 Hearing at 2, 7.

[25] *Lawrence* v. *Texas*, 539 U.S. 558 (2003); *Eisenstadt* v. *Baird*, 405 U.S. 438, 447 n. 7 (the law "fails to satisfy the even more lenient equal protection standard.").

[26] 505 U.S. 833 (1992).

children to be protected from harm. If proponents of the Amendment are concerned that state intervention in families sometimes goes too far (and I agree it sometimes does), then legislative change provides the remedy. For example, federal statutes set national policy in the realm of child abuse and neglect, and can be revised at any time.[27]

The Amendment threatens radical legal change

The proponents' representations that the Amendment merely captures and clarifies existing constitutional law notwithstanding, some of the language in the Amendment represents a radical departure from current understandings. In any event, as I am sure Committee members are aware, if the Amendment were to be adopted, the representations of its drafters and congressional sponsors would not have any precedential value when courts interpret the Amendment's language and import. I take the Amendment's Sections in numerical order.

Section 2 includes radical language (newly added to the 2014 version of the Amendment) that would give parents "the right to make reasonable choices within public schools for one's child." This turns current law on its head, and threatens to undermine the efficacy and orderliness of public schools. Well before our current influx of immigrants from the far corners of the earth and the rapid multiplication of diverse religious groups we have recently experienced, the Supreme Court took note that: "[p]robably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing."[28] In that case, *Board of Education* v. *Barnette*, the Court held that students have the right not to be compelled to express views they do not accept, but did not contemplate that students or their parents could pick and choose whether children should attend required educational activities. The doctrine the Amendment proposes would transform public education — making it resemble a smorgasbord, with each course, each unit of each course, and each assignment subject to the wide diversity of parental values and beliefs. Chaos would result, significantly undermining the quality of education, which the Supreme Court has long recognized as "perhaps the most important function of state and local governments," and one in which the state undoubtedly has a compelling interest.[29]

Section 3 requires application of strict scrutiny to the rights protected by the Amendment, and would change the law in the ways discussed above.

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[27] Adoption Assistance and Child Welfare Act of 1980; Adoption and Safe Families Act of 1997.

[28] *Board of Education* v. *Barnette*, 319 U.S. 624, 641 (1943) (Jackson, J.).

[29] *Brown* v. *Board of Educ.*, 347 U.S. 483, 493 (1954).

Section 4 states in full: "This article shall not be construed to apply to a parental action or decision that would end life." There is a serious risk that courts would interpret this language on its face to bar abortions (and, perhaps, some forms of contraception) if state or federal statutes define "life," to include fetuses at stages of development during which women currently have a constitutional right to control their own bodies. Such a dramatic shift in our understanding of individual rights should not be accomplished by stealth. If the proponents seek a revolution in the constitutional status of reproductive rights, they should propose an amendment that would transparently accomplish that end. If the language in the proposed Amendment threatens this result unintentionally, it should be redrafted to clarify that the exception is limited to situations in which parents withhold consent to medical treatment that is needed to save the life of a child who has already been born.

Section 5 similarly would accomplish a legal revolution. It would diminish the Executive's power to "make treaties" and the Senate's authority to "advise and consent" with respect to treaties (Art. II, § 2) by restricting the permissible content of such agreements. This is unprecedented. The reference to international treaties takes aim at the U.N. Convention on the Rights of the Child, which only the United States and Somalia have not ratified. For many years those who opposed U.S. ratification argued that the Convention would prevent the United States from executing criminals based on crimes they committed as juveniles; the Supreme Court held in 2005 that such executions violate the Eighth and Fourteenth Amendments,[30] thus eliminating the most glaring discrepancy between the Convention and domestic law. Section 5 would also inhibit judicial powers to consult international legal norms.

The Constitution should never be amended absent a pressing need

Article V of the Constitution intentionally makes the process of amending the Constitution arduous. Since 1791, when the first ten amendments were approved, the Constitution has only been amended 17 times (once to repeal the 18th Amendment that imposed prohibition). The bulk of the remaining 15 amendments either rectified serious injustices (including slavery and denial of suffrage) or adjusted the operation of the federal government.

Since 1791, no amendment has been adopted that was designed to entrench current understandings of the law into the Constitution or to *ratify* a Supreme Court precedent. To do so trivializes the process, and endangers the conciseness that is one of the strengths of our founding document.

It is imprudent to tamper with the text of the Constitution when no pressing problem calls out for a remedy.

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[30] *Roper* v. *Simmons*, 543 U.S. 551 (2005).

This Committee wisely refrained from reporting out the predecessor to this Amendment in 2012. For all of the reasons stated above, I urge the Members to exercise the same prudence in 2014.

Thank you for inviting me to testify today.

Mr. FRANKS. And I will now recognize Ms. Wright for 5 minutes.

TESTIMONY OF WENDY WRIGHT, C-FAM, CENTER FOR FAMILY AND HUMAN RIGHTS

Ms. WRIGHT. Thank you for the invitation to testify today. The evolution of U.N. Treaties, their reach into issues like parental rights with views alien to Americans is troubling. Even more alarming, are government officials giving credibility to foreign sources that threaten established rights. Advocates who don't share Americans' beliefs in parental rights turn to U.N. Experts for validation and a veneer of authority.

U.N. Experts issue opinions and papers dismissing the role of parents.Agencies like UNICEF say children as young as 10 have rights to access services without their parents' knowledge, thus giving greater authority to adults offering such services than to parents.

Supreme Court Justices have looked to U.N. Treaties which the U.S. Has not ratified or limited by an explicit reservation to justify their decisions.

The threat to parental rights through the evolution of U.N. Agreements comes by design. Governments carefully negotiate U.N. Treaties. Yet U.N. Committees that monitor compliance have become notorious for misinterpreting and even contradicting what governments agree to.

Recently the Committee on the Rights of the Child decided children from ages 1 to 18 have sexual and reproductive rights and should receive services, including abortion, without parental consent. The U.N. Committee Against Torture criticizes restrictions on abortion as tantamount to torture. A Member of this Committee says opposing abortion may be a form of torture. This Committee Member is closely aligned with a group dedicated to overturning abortion laws. At a meeting hosted by this group she said she looked for opportunities to promote abortion. She conceded U.N. Committees have no binding authority. They put opinions out in ether and hope others pick it up, to use in litigation, to name and shame, and to demand compensation.

In 1996, U. N. staff, activists and academics who shared a core belief in the sexual autonomy of children, redefining family and marriage, and abortion, adopted a strategy to use the U.N. Bureaucracy of experts to create new human rights. First, U.N. Treaty committees would declare new interpretations.

Second, U.N. Agencies reinforced the new interpretations with technical guidance detailing how nations should incorporate these concocted rights. For example, the World Health Organization and the Office of the High Commissioner on Human Rights have published papers on making abortion accessible with no protections and no parental involvement. UNICEF claimed the Disabilities Treaty gave children as young as 10 the right to reproductive and health services without their parents' knowledge or consent.

Alone, they are just an echo chamber. They only carry weight if government officials treat them as influential. So, third, advocates lobby and file lawsuits treating U.N. Opinions as authoritative.

Following recommendations by a U.N. Treaty committee, the high courts of Argentina and Colombia struck down their abortion bans.

Most troubling, Supreme Court Justices have looked to foreign sources to corroborate their decisions. In *Roper v. Simmons*, the court referred to the Convention on the Rights of the Child, a treaty the U.S. has not ratified. An optional protocol to the child's rights treaty allows children or groups to file complaints directly to the U.N. Committee. If the U.S. were to ratify this optional protocol, complainants who do not like the outcome of their case based on U.S. law, could invite U.N. Bureaucrats to sit in judgment of U.S. Laws and norms. U.N. Staff will rely on paperwork submitted by self-selecting advocates of this international system. Their perspective will be the child's rights approach that isolates children as autonomous and views parents as infringing on children's rights.

In light of the stated intentions, coordination and funding that is propelling the international rights based movement, in particular the child's rights movement, defenders of parental rights have cause to be concerned. Thank you for your attention.

[The prepared statement of Ms. Wright follows:]

Congress of the United States

House of Representatives

Committee on the Judiciary

Subcommittee on the Constitution and Civil Justice

Proposing an Amendment to the Constitution of the United States Relating to Parental Rights

Testimony of

Wendy Wright

C-Fam
Center for Family and Human Rights

September 9, 2014

Thank you for the invitation to address the Subcommittee on the Constitution and Civil Justice on a constitutional amendment on parental rights.

Kids figure out quickly how to argue to get what they want.

First, ask mom. If she says no, ask dad.
Then comes the appeal to an outside source: "Jill's mom let's her do it."
As kids get more sophisticated, they turn to experts. "You know, studies say drinking a lot of beer can keep you from getting sick." [1]

(It turns out the experts were funded by a beer company.)

Children cannot raise themselves. It takes deep love, perseverance, and intimate knowledge. Parents are responsible – and ultimately held responsible – for their child's well-being.

Yet some say children are autonomous, able to make their own decisions, and experts trump parents. This view is contrary to Americans' shared beliefs. So advocates reach outside the U.S. for validation – and a veneer of authority – to the UN.

UN experts on treaties routinely dismiss and undermine the inviolable role of parents. UN agencies like UNICEF say children as young as 10 have rights to access services without their parents' knowledge, thereby giving greater authority to adults offering such services than to parents. U.S. Supreme Court justices have looked to UN treaties – which the U.S. has not ratified or limited by an explicit reservation to the treaty – to justify their decisions promoting a child's-rights approach that degrades parental rights.

Opinions from international sources are being crafted and used to override Americans' deeply-held beliefs and rights regarding children and parents.

The evolution of UN treaties and institutions, their reach into domestic issues like parental rights, with views alien to American rights and norms, is troubling. Even more alarming are government officials, including judges, giving credibility to these UN and foreign sources to threaten established rights like parental rights.

UN Treaty Committees

The threat to parental rights through the evolution of UN agreements comes by design.

Governments carefully negotiate the terms of UN treaties. Then decide whether to join the treaty, which can include agreeing to report regularly to a UN committee that monitors compliance. UN treaty committees are made up of individuals whose influence

[1] Boehler, Patrick. *Got a cold? Have a Beer!* Time Magazine, Dec. 10, 2012. http://newsfeed.time.com/2012/12/10/got-a-cold-have-a-beer/ (accessed September 6, 2014)

is nothing more than they are knowledgeable on the treaty's subject, and were selected to be on the committee that receives reports and gives recommendations.

These committees, however, have become notorious for re-interpreting and expanding treaties beyond – and at times contradicting – what governments agreed to.

Recently, the Committee on the Rights of the Child said Catholic teaching on abortion violates the human rights of girls. They certainly were not considering the baby girls who are aborted, nor allowed for parents to have a say in protecting their girls from abortion.

The committee also adopted an analysis to drive their decision-making (General Comment 15) stating children (defined as ages 1 – 18 years old in the treaty) have sexual and reproductive rights and should be able to receive services without parental consent. This is especially troubling to the U.S. with our federal system that recognizes states' authority on family issues.

The UN Committee Against Torture repeatedly criticizes restrictions on abortion as tantamount to torture.[2] Recently, a member of the UN Committee Against Torture told the Vatican that opposing abortion may be a form of torture.[3]

This UN specialist is closely aligned with the Center for Reproductive Rights (CRR), an organization dedicated to overturning laws regulating abortion. Two years ago, at a meeting hosted by CRR, she said she looked for opportunities as a member of this UN committee to promote abortion. Being the only woman on the committee, none of the male members would challenge her, she said.

She readily conceded that UN treaty committees have no binding authority. They put opinions "out in the ether and hope others pick it up." She encouraged groups to use the committee's conclusions in litigation, public advocacy, to "name and shame," and to demand compensation.[4]

Some groups, she noted, have used recommendations from the UN women's treaty committee to pressure government officials to ensure doctors are trained to do abortions, and incorporated the committee's opinions into human rights training of medical professionals.

No UN treaty mentions abortion. Last week C-Fam released a list of over 275 instances of just one UN committee, for the women's treaty, pressuring countries to legalize abortion. This began ramping up in the mid-1990s.

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[2] Conclusions and recommendations of the Committee against Torture: Peru, July 25, 2006. (CAT/C/PER/CO/4), para. 23

[3] Berkow, Richard. *UN Tells Catholics to Change Canon Law; not allowing abortion is 'torture' of pregnant girls,* BizPac Review. May 10, 2014. http://www.bizpacreview.com/2014/05/10/un-tells-catholics-to-change-canon-law-not-allowing-abortion-is-torture-of-pregnant-girls-118154 (accessed September 7, 2014)

[4] Wright, Wendy. *Committee Member Admits Opinions are Not Binding*, Turtle Bay and Beyond. December 14, 2011. http://www.turtlebayandbeyond.org/2011/turtle-bay-un/committee-member-admits-opinions-are-not-binding/ (accessed September 6, 2014)

In 1996, UN staff, non-governmental organizations (NGOs) and academics met in New York.[5] They shared a core belief in the sexual autonomy of children, especially girls, the redefinition of family and marriage, and abortion.

The UN Population Fund, Office of High Commissioner for Human Rights, and UN Division for the Advancement of Women sponsored the event on "The Roundtable of Human Rights Treaty Bodies on Human Rights Approaches to Women's Health, with a Focus on Sexual and Reproductive Health and Rights."

The meeting summary states, "A human rights approach is premised on the view that reproductive and sexual health rights are integral to recognized human rights -- in particular, to life, liberty and personal security, and the highest attainable standards of health."

They adopted a strategy to harness the UN bureaucratic system of experts to advance new human rights. This approach sidesteps the laborious process of passing laws, or winning the consent of countries at the UN. Rather than sway voters or legislators, only one or a few members of a committee would need to be persuaded.

Simply put, UN treaty committees would regard abortion and other disputed issues (such as children's autonomy) as essential to fulfill already agreed-upon human rights.

With this approach, treaties become evolving documents with understandings different from what was consented to by the state parties – and sometimes contradicting the text. The committee members, individuals with no accountability, craft the interpretations. It turns custodians of international agreements into masters.

UN staff and agencies reinforce new interpretations with "technical guidance" detailing how concocted rights are to be reflected in nations' laws and regulations. For example, the World Health Organization and the Office of the High Commissioner on Human Rights published papers on making abortion accessible without any protections for women or girls, and no parental involvement. Over the last two years, as Christians and religious minorities are slaughtered in the Middle East and Africa, the Office of the High Commissioner on Human Rights devoted attention to producing glitzy publicity campaigns and music videos to advance sexual rights.

People endowed with titles like UN Special Rapporteur claim authority to declare international rights. In 2010, the Special Rapporteur on the Right to Education, Vernor Muñoz, called into question the inviolable role of parents in the sexual education of their children. Juan Mendez, Special Rapporteur on Torture, stated in 2013 restrictions on

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[5] Sylva, Douglas A., and Susan Yoshihara. *Rights By Stealth: The Role of UN Human Rights Treaty Bodies in the Campaign for an International Right to Abortion*; International Organizations Research Group White Paper Number 8, second edition, 2009. http://c-fam.org/en/white-papers/6581-rights-by-stealth-the-role-of-un-human-rights-treaty-bodies-in-the-campaign-for-an-international-right-to-abortion (accessed September 6, 2014)

abortion where otherwise legal is tantamount to torture. Anand Grover, the Special Rapporteur on the Right to Health claimed abortion is an international right in his report in 2011. In 2009, the Special Rapporteur on Counter Terrorism Martin Scheinin left the scope of his mandate to define gender as a "social construction."

UNICEF interpreted the Disabilities treaty as giving children as young as 10 the "right" to reproductive and sexual health services without the knowledge or consent of their parents.[6]

Advocacy groups lobby within countries and file lawsuits, telling legislators and judges these UN-generated opinions are authoritative. [7]

Each reinforces the other, appearing to carry the UN seal of approval, creating a perception of international imprimatur.

Alone, they are just an echo chamber. They only carry weight if national or local officials treat them as authoritative. For some, UN opinions that align with their personal views provide a hook to alter national laws and norms.

Following recommendations by the UN women's treaty committee, the high courts of Argentina and Colombia struck down abortion bans.

The American Bar Association created a tool kit to train activists, judges and legislators to use the UN women's treaty. It was funded by USAID. [8]

The State Department is issuing $1 million in grants to U.S. and foreign organizations to implement the Disabilities treaty – a UN treaty that the U.S. has not ratified. A 2014 request for proposals seeks to fund programs to assist civil society and governments for "Strengthening Implementation of the Convention on the Rights of Persons with Disabilities."[9]

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[6] UNICEF director Tony Lake asserted in the agency's May 2013 report, "Under the Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD), all children have the right to the highest attainable standard of health. It follows that children with disabilities are equally entitled to the full spectrum of care – from immunization in infancy to proper nutrition and treatment for the ailments and injuries of childhood, to *confidential sexual and reproductive health information and services during adolescence and into early adulthood.* Equally critical are such basic services as water, sanitation and hygiene." UNICEF, *State of the World's Children 2013,* page 23. Emphasis added. http://www.unicef.org/sowc2013/files/SWCR2013_ENG_Lo_res_24_Apr_2013.pdf

[7] For a partial list of lawsuits, see Abortion Law in Transnational Cases, https://reprohealthlaw.wordpress.com/tag/peru/ (accessed September 7, 2014)

[8] The CEDAW Assessment Tool, https://apps.americanbar.org/rol/publications/assessment_tool_cedaw_tool_2002.pdf (accessed September 7, 2014)

[9] Bureau of Democracy, Human Rights and Labor Requests for Proposals: Strengthening Implementation of the Convention on the Rights of Persons with Disabilities (January 9, 2014). http://www.state.gov/j/drl/p/219515.htm (accessed June 10, 2014)

Most troubling, U.S. Supreme Court justices have looked to foreign sources to corroborate their decision. In *Roper v Simmons*, the Court cited the Convention on the Rights of the Child, a UN treaty the U.S. has not ratified, and the International Covenant on Civil and Political Rights, to which the U.S. specifically reserved on the relevant issue.

Individual Grievances

In April 2014, a third Optional Protocol to the Convention on the Rights of the Child was adopted. It allows children or groups to file complaints directly to the CRC committee against any country that has ratified the protocol, after exhausting their national system. The committee will investigate, and can direct governments to take action. States report back on steps they took to comply.

If the U.S. ratifies this protocol, complainants who do not like the outcome of their case based on U.S. law could invite UN bureaucrats, with no stake in America or responsibility for the consequences, to sit in judgment of U.S. law and norms.

Distant UN staff will rely on paperwork submitted by self-selecting advocates of this international system. Their perspective will be the child's-rights approach that isolates children as autonomous beings and views parents as infringing on children's rights.

They simply do not have a greater sense of justice, insight or compassion by virtue of sitting on a UN committee. The lack of accountability and oversight for their decisions invites mischief.

Murky Motives

It is important to remember the UN is not like the U.S.

The UN system lacks accountability, transparency, checks and balances, effective measures against corruption. Documents and decisions are not as pure as assumed.

The UN Population Fund (UNFPA) frequently gets staff or supporters onto government delegations that are negotiating UN agreements that can benefit the agency in clout and resources. Its former chief Nafis Sadik told a gathering she used donations to enable activists to be on government delegations to the 1994 Cairo conference on population and development, a turning point in the international abortion debate.[10] At a regional meeting in 2004, more UNFPA staffers were present, on delegations or lobbying, than government representatives.

[10] Wright, Wendy. *UN Leaders Lament 20-Year Failure to Advance Abortion*, C-FAM Friday Fax, May 2, 2013. http://c-fam.org/en/2013/2069-un-leaders-lament-20-year-failure-to-advance-abortion (accessed September 6, 2014)

The International Women's Health Coalition, a key player in the abortion rights-based strategy, recently lamented that "very few activists were named as representatives on government delegations" to a regional UN meeting – as if this were unusual. [11]

Some ambassadors and delegates, particularly from poor countries, or undergoing regime change, or when it comes time to rotate out of New York, seek or are courted for UN positions – simultaneous to representing their country in negotiations.

The MacArthur, Ford and Rockefeller Foundations have generously funded the rights-based groups working this international strategy. Recently these extremely wealthy foundations applied for UN accreditation, giving them direct access and influence into the UN.

Guard parental rights for stable societies

No other institution or individual can replace a mom or dad. The child's-rights approach predominant in international discussions undermines parental rights – and thus harms children, families and societies.

In light of the stated intentions, coordination, and funding propelling the international rights-based movement, defenders of parental rights have cause to be concerned.

[11] Girard, Françoise. *Taking ICPD beyond 2015: Negotiating sexual and reproductive rights in the next development agenda.* Global Public Health. Vol. 9, Iss. 6, 2014, http://iwhc.org/resource/taking-icpd-beyond-2015/ (accessed September 6, 2014)

Mr. FRANKS. I want to thank the witnesses.

And we will now begin the question time. And I will recognize myself for 5 minutes for the first question.

You know, I took a note, Ms. Ross, of one of the comments that you made that said children also have constitutional rights of their own in the areas of abortion and contraception. That was sort of a paraphrase. And for a moment, I genuinely didn't understand what you were talking about. I thought, well, maybe there is some common ground here. But it is difficult for me to understand why children have the right to an abortion but not the right to be protected from it. It is a strange situation.

I think it also speaks to the whole issue of the necessity of such an amendment. I think 30, 40 years ago, 40 years ago, more, most of us in America believed that the right to live was a fundamental right. In fact, it was clearly enumerated in the Constitution. It was as clear as it could possibly be. And I don't think too many people believed that some day, that we would take the lives of 3,000 children every day, to take their right to live away every day, even though it is enumerated in the Constitution, without at least some due process of law. But that is where we are, so I would commend the sponsors of this amendment for making sure that they run ahead of some of the curve here because it has been a pretty wild ride.

The four-judge plurality in *Troxel v. Granville*, Mr. Farris, described parental rights as having been recognized as fundamental historically but then declined to use the strict scrutiny test that applies to an examination of fundamental rights. Since then, Federal and State courts applying all kinds of legal standards have permitted government intrusions on parental rights ranging from school choice to the most basic aspects of a child being raised.

Can you speak a little more about these varying standards that the courts are applying and how this amendment would address those concerns?

Mr. FARRIS. Yes, I can, Mr. Chairman. The case that illustrates the problem that is cited in my written testimony, is the case of *Littlefield v. Forney Independent School District*. That case was about dress codes, and I personally think that the Court got to the right outcome in the substance of the decision. But as every lawyer, especially who practices in the area of constitutional law knows, it is not merely the outcome of the facts but it is the legal principle that is announced.

The Court held in that case that in many situations, you do not use the fundamental rights analysis for parental rights, but instead you use nonfundamental rights analysis, which is the least restrictive means method. And what that basically does is this: It changed the burden of proof from the government proving that it has a compelling need to intrude into the family and instead puts the family as bearing the burden of proof to justify that its reason to object to the government program is sufficiently warranted. That changing of the burden of proof from a nonfundamental right to a fundamental right is a huge difference in outcomes in cases. And it basically answers this question, who has the primary authority over the child? If it is a fundamental right, primary authority lies with the parent. If it is a nonfundamental right, primary authority

lies with the government. It is as simple as that, and in actual practice, that is how it works.

The *Littlefield* case should have been resolved, if they wanted to reach the outcome and not destroy the fundamental rights test, by simply saying there had not been an adequate burden shown by simply requiring the kids to have a dress code adherence in the public schools. And on that point, the idea that section 2 of the amendment would disable the public schools, people haven't read it carefully. It says the parental right to direct education includes the right to choose public, private, religious or home schools and the right to make reasonable choices within public schools for one's child. It doesn't give you the right to change the curriculum for everybody else, but if you don't want your child going to the sex ed assembly, you would have the right to make a reasonable choice for your child. And so the ability to make choices for other people's children is not protected.

Mr. FRANKS. Ms. Wright, I am going to try to squeeze in a question with you. Who makes the decision does, indeed, seem to be the real choice here, the real question, because one of two people will make decisions on how a child will be educated or what their upbringing will be. It will either be a parent who would pour out their blood on the floor for them or a bureaucrat who doesn't know their name, and I find that to be pretty profound.

Ms. Wright, the U.S. Constitution recognizes that international law in the form of a ratified treaty becomes part of the supreme law of the land, limited only by explicit constitutional provisions and safeguards. Treaties adopted by the United States are supreme over State laws according to the Constitution. So can you tell me more about how the U.N. Convention on the Rights of the Child, how it operates and how it could threaten American families if it were ratified?

Ms. WRIGHT. Thank you. The United States has not ratified the Convention on the Rights of the Child for a very good reason. It comes from a different perspective than Americans' perspective. We truly believe in parental rights and the role of the parents because parents know their children best. Convention on the Rights of the Child comes from the child's right perspective that officials or experts can know better than parents. So there is good reason the United States has not ratified it. But what is particularly concerning is that we have had government officials look to the Convention on the Rights of the Child to corroborate their own opinions, like what happened in the *Roper* decision.

The Supreme Court in a sense validated the point of view of the Convention on the Rights of the Child. Now, it is the step by step process that I explained in my testimony that is particularly concerning, that these treaties like the Convention on the Rights of the Child set up a committee of so-called experts. They are experts just because they are knowledgeable on the subject of the committee, and they are selected to sit on this committee. They have taken it upon themselves to—they have the ability to interpret the treaty, but they have taken it upon themselves in too many cases to misinterpret or reinterpret the treaties.

Then the agencies like UNICEF take those interpretations, take those opinions, and validate them in papers, in guidance to coun-

tries, assuming that these interpretations are now new rights and telling countries how to implement, how to apply those rights reflected in their laws and their cultures.

So Americans are generally pretty leery of the United Nations, especially when it gets involved in domestic issues. People are not quite as aware of this step-by-step process that is already occurring to misinterpret the treaties even further than what Americans are already concerned with.

Mr. FRANKS. Thank you, Ms. Wright.

And I would now recognize Mr. Cohen for 5 minutes.

Mr. COHEN. Thank you, Mr. Chair.

Mr. Farris, first, let me ask you, I was reading the article, proposed article, section 2, the parental right to direct education includes the right to select public, private, religious or home schools, and. Is there any issue right now with any State prohibiting a parent from choosing a public school, private school, a religious school, or home school?

Mr. FARRIS. Not today. As recently as 5 years ago, California, the Court of Appeals——

Mr. COHEN. Five years ago.

Mr. FARRIS. Currently, but there are proposals on the table. The National Education Association, for example, has standing resolutions to ask that home schools be regulated under a way that effectively bans home schooling, and if that political proposition——

Mr. COHEN. You are a great proponent of home schools. Have you ever testified on home schools in Tennessee——

Mr. FARRIS. I think I have, yes.

Mr. COHEN. I am trying to remember. And I supported home schools. I got an award from the home schoolers, in fact. I worked for 20 years in Tennessee to create a Tennessee State education lottery, and most of the people that support home schools or many of them opposed that amendment because they thought if it passed, that we were going to have Biblical proportion type events, with locusts descending on our State and rivers doing like—and all kind of terrible things happening and lack of oranges and all those things. But none of them happened, and when the amendment passed, the home schoolers are the first people at my office wanting to get their kids lottery scholarships, and I helped them. And they gave me an award. And I am not against home schoolers.

But I am not also for amending the Constitution unless it's necessary. Now, we amended our State Constitution to do that, and we helped a lot of home schoolers get scholarships to go to colleges. But there is no problem here. You said 5 years ago, there was a problem, but there is not a problem today. Why should we amend our Constitution for problems that were 5 years old and don't exist anymore?

Mr. FARRIS. The narrow question you asked me is whether or not people are being banned from making those fundamental choices. The answer is no. Are they being punished for making those choices, the answer is yes, they are.

Mr. COHEN. Let me ask Ms. Ross. The second part of that amendment is the right to make reasonable choices within public schools for one's child, the parental right to make reasonable

choices within public schools for one's child. How would that affect public education if that——

Ms. ROSS. Well, every parent has different views about what is appropriate and what is not appropriate for their children. And I have always pointed out that parents don't come in one dimension with one set of values. So that means that every parent would be going into school and saying, I don't like the reading that is assigned next week. I don't want Johnny reading that. While it is true that they can't on the surface affect what every child learns, I want to emphasize that this is not going to be limited to sex education, which is what we usually think of. It is already a prevalent problem with respect to the teaching of basic scientific theory and biology, but it also comes into play with art history. There may be naked bodies that some parents object to. There may be parents on the other side of the spectrum who say, I don't want my kids hearing a conservative interpretation of American history. How is the school supposed to operate?

Mr. COHEN. We are having that now in Tennessee. They just want to have happy history and not really history, and they don't want to talk about slavery because that is not happy history. They just want to talk about happy history. It is really challenging. It is really kind of strange. We don't really, when you get down to the fundamentals, there are a lot of things happened in our great country that weren't so wonderful. I mean, slavery was the worst thing that people could really think of, next I guess to executions, and we had that for 246 years. Some people don't want to teach it because that is unpleasant.

Ms. ROSS. It doesn't put us in a good light.

Mr. COHEN. It doesn't put us in a good light, right. So there is a whole bunch of that stuff.

How would this affect—would this amendment possibly allow a parent to maybe deny vaccinations for their child and/or treatment, life-saving treatments, or maybe even allow a parent to give their child alcohol or drugs against the laws of the State?

Ms. ROSS. I think if taken really seriously, there could be court cases in which parents claim that this is beyond the government's power. I think each of the examples you used, the government could make a clear case that there was a compelling interest, but we shouldn't have to reopen these very fundamental issues.

Mr. COHEN. Ms. Wright, your group deals with religion. What if a group thought peyote was a part of their religion—and there are still such folks that get a religious experience therefrom—and wanted their children to partake in this experience and have a group religious experience. Would this amendment protect people for giving their children peyote, would it not?

Ms. WRIGHT. I would not address that issue. I am not an attorney, so I don't feel qualified to address that.

Mr. COHEN. Mr. Farris, you are an attorney. Would you feel comfortable? This would say the parents have a right to give their children peyote.

Mr. FARRIS. I think the government would have a compelling governmental interest in that case that would be sufficient to overcome.

Mr. COHEN. Why?

Mr. FARRIS. Why? Because I think the showing could be that peyote would harm the child, and that would be the standard.

Mr. COHEN. What if it was marijuana? The government couldn't show that marijuana would necessarily harm the child.

Mr. FARRIS. That is, you know, there are whole States all mixed up on that. I think that marijuana is harmful.

Mr. COHEN. For children it is, but some parent may not think that. But you are giving the parents the right to decide that.

Mr. FARRIS. Right. I am sorry. I didn't mean to interrupt.

Mr. COHEN. Well, I have interrupted you, I guess. But you are giving parents the right to decide that.

Mr. FARRIS. No. The lawsuits that you proffered, anybody can sue about anything, and it doesn't mean they are going to win. So you do drafting by lawsuits that are predictably winnable. I don't think that any of the parade of horribles that—Ms. Ross gave a careful answer. Parents could file such lawsuits. That is true. They could file such lawsuits. Would that be given the light of day? No, they wouldn't be given the light of day.

I litigated a case a couple years ago in Michigan which has a statute that tracks this language almost exactly, Michigan's Parental Rights Statute. It was a medical neglect case where a little boy had Ewing sarcoma, and in that case, the evidence was not clear whether the boy was sick, and the drugs they wanted to give him were not clear that they were safe and effective. We argued it was the gray zone. Who makes the decision when it is a gray zone? If it was clear that this boy was sick and the medicine was safe and effective and they refused to give it, the government would have the right to override. But when it is not clear that the boy is sick and when it is not clear that the medicine is safe and effective, who decides then? That was the case we litigated, the case that I won in the trial court, using a statute just like this that said parents decide in those kind of close cases. That is the outcome we would see under this language.

Mr. COHEN. My time having expired, and the Chairman is being very liberal with my time. I yield back the balance that I don't have.

Mr. FRANKS. Thank you, Mr. Cohen.

I now recognize Mr. DeSantis, the gentleman from Florida.

Mr. DESANTIS. Thank you, Mr. Chairman.

Mr. Farris, what protections for parents are included, if any, in any State constitutions? Is that something that you have looked at?

Mr. FARRIS. I have looked at it. I haven't looked at it in the last couple of weeks, but I am pretty sure that Oklahoma is the only State that has a State constitutional protection. There is a movement in Missouri. I believe the Missouri legislature looked at it. I don't know whether it passed, but I don't think it has gone to a vote of the people yet.

Mr. DESANTIS. I mean, it seems to me just thinking through some of the issues raised—let's put aside international treaties. It seems the lion's share of issues that would come up with this would be based on local or State action, as opposed to Federal. Do you agree with that?

Mr. FARRIS. That is correct, but the international component of this is not insignificant. And so the design of the Parental Rights

Amendment is to answer the parental rights issue once and for all while we still have societal consensus on the issue. And with the Convention on the Rights of the Child and the other things, which overrides State constitutions and under the explicit language of the supremacy clause, any conflict between the CRC and the constitution of Oklahoma, the CRC will prevail in American courts.

Mr. DESANTIS. Understood. Now, with respect to the treaty and how that would prevail, if you just had the first four sections, you wouldn't need section 5, would you? In other words, if something is in the Federal Constitution, you cannot—the Senate cannot infringe on the Constitution by ratifying a treaty. Now, I know there are cases out there, and there are some people who, but the way the Constitution is supposed to work, you cannot legislate around the Constitution by treaty. Correct?

Mr. FARRIS. Correct. The reason that section 5 is in there is in my course work in getting an LLM in Public International Law from the University of London, I wanted to take into account the eventuality that we end up in an international court. In an international court, our Constitution is secondary to treaties, unless the treaty is in conflict with a provision of the Nation's Constitution, and it goes to the capacity to enter into the treaty. So I wrote section—I drafted section 5 with a design to trump treaties, even if we end up some day in an international tribunal like the tribunal that is being created by the Committee on the Rights of the Child, the optional protocol that exists today. That was the reason for section 5.

Mr. DESANTIS. Okay. Got you. In terms of section 2, this reasonable choices, and this may be, there may be background law for this, I just don't know. For example, on the Fourth Amendment, unreasonable searches and seizures, that had a common law context and people kind of knew what that meant, because I have heard some of the back and forth here, is there kind of a body of objective standards that we would see what is a reasonable choice? Because it seems like some people would think something is reasonable, and others would say that that is not reasonable.

Mr. FARRIS. There have been a great number of cases that have been litigated about opting out of various programs in the public schools. I litigated one of those myself in Tennessee about 30 years ago, it seems like. And the courts have a record of what is reasonable and what is not reasonable. But in the last 10 or 15 years, we have moved away from that standard and to the standard of saying, you don't have the right to object to what your child learns in the public schools at any time for anything.

Mr. DESANTIS. And so if this were ratified, are you confident there would be an objective meaning to that that would be understood by society that could be applied in different cases?

Mr. FARRIS. Yes, I do believe that. The attempt has been at this stage, obviously, drafting changes could be made if there is a need for clarity on any point, but the attempt has been made to use terms of art that have a recognized history behind them where we know what they mean. We know that a governmental interest as applied to the person is of the highest order and not otherwise served. There are hundreds of cases about all that terminology. Those are recognized terms of art. It is literally word for word out

of *Yoder*. And so what I was trying to do in helping to draft this was to make sure that we are using the very language that the courts have recognized so that we are walking on carefully plowed ground, not on new ground.

Mr. DESANTIS. Thank you for that.

Ms. Ross, just a little piece that I noticed in your testimony that I disagreed with. You write, since 1791, no amendment has been adopted that was designed to entrench current understandings of the law into the Constitution. And I noticed you used the words "since 1971," but I mean, the Bill of Rights in 1791, wasn't that the whole purpose that they were trying, you used the words "entrench," I would say enshrine, current understanding of the rights that the Founding Fathers believed were part and parcel of what it meant to be, before in the colonial times, the rights of a Englishman, and that reflected that common law tradition, and they did want to enshrine that so that they would protect it in the future so that those protections would endure. In case society changed, they wanted that to be anchored into the Constitution.

Ms. ROSS. That is an excellent point. And yes, you are right. But there is a story behind that, which is the debate among the Founders, between Madison and other Founders, about whether the Constitution had to expressly reserve the rights that everybody assumed they already had as Englishmen.

Mr. DESANTIS. No, I understand that, and that was a very important——

Ms. ROSS. Right, and that was a tradeoff in order to get enough of the colonies to—former colonies to ratify the Constitution. It was not suggested that after that time, every time there was a right that people thought they had, they would need to put it in the Constitution. We have never seen that happen since 1791.

Mr. DESANTIS. But the fact that they did do that, I just think it cuts against your point because Hamilton's argument in the Federalist was that the Constitution of itself is a Bill of Rights. You don't need a special bill of rights because it is a government of limited and enumerated power, so you don't need to say that you can't establish a national religion because you have no affirmative source of authority to do that. So the fact that they went back and did the Bill of Rights, to me would suggest that even if there is precedent for certain rights, they felt the need to codify it into the Constitution.

So, I mean, take your point. I think you have made some good points. And I am somebody who I do support some constitutional amendments, but I think we need to approach this in a very judicious way. But it seems to me, and I would even say the 22nd Amendment in some sense, there was a longstanding tradition that had been broken by FDR, and then people went to codify that, but I appreciate your testimony.

I am out of time, so I will yield back to the Chairman.

Mr. FRANKS. And I thank the gentleman.

And I would now recognize the gentleman from Virginia, Mr. Scott for 5 minutes.

Forgive me. We will recognize Mr. Conyers for 5 minutes.

I am so sorry. Forgive me. Forgive me. We recognize Mr. Conyers for 5 minutes.

Mr. CONYERS. I don't mind yielding to——

Mr. FRANKS. Mr. Conyers had given an opening statement, and I sort of assumed that he had taken his turn, but he hasn't.

Mr. CONYERS. I will be relatively brief.

Let me ask Ms. Ross this question. Ms. Wright maintains the Supreme Court's decision in *Roper v. Simons* finding that death penalty for juveniles would be unconstitutional is the reason why the U.N. Convention on the Rights of the Child threatens the constitutional liberty of parents to make child-rearing decisions.

How do you interpret this issue?

Ms. ROSS. Well, Ms. Wright herself has agreed and conceded that the committee that is charged with supervising the implementation of the Convention on the Rights of the Child has no enforcement powers. No enforcement powers. That means the committee cannot go after the United States in its own forum, in any international court that exists today, in domestic courts. So I don't see how the U.N. convention could limit the rights of parents in the United States.

With respect to what she said about the Court taking cognizance of what other countries do in terms of the death penalty and minors and—for acts committed while they were minors, there is a special place in Eighth Amendment jurisprudence that is not found anywhere else. We have a tradition of the Court looking at what other countries do to try to assess the evolution of the sense of decency.

Mr. CONYERS. Ms. Wright, as a leader in the Center for Family and Human Rights Institute, do you have a response, or is there anything you would like to add?

Ms. WRIGHT. Yes, and thank you for the opportunity to respond. As I pointed out in my testimony, the interpretations of the committee do not have any binding authority. Even the committee members admit that.

The problem comes when government officials, U.S. Government officials, give these opinions some sense of authority, looks to them for guidance, and—and that has already occurred. That is—that was my reference to the *Roper* case, is that we even have some Supreme Court Justices who have looked to these treaties—in fact, a treaty that we have not even ratified—as if it provides some guidance for us. And that is why people have concerns. It is because of the actions of government officials that have caused parents and others to have concerns that these officials will look to foreign sources for authority as opposed to relying on the American Constitution, American statutes, American values.

Ms. ROSS. I think you are just over—I am sorry. Ms. Wright is overlooking what I said about the special jurisprudence for the Eighth Amendment, which has always looked internationally. I don't think there are other good examples.

Mr. CONYERS. Now, Attorney Ross, Mr. Farris acknowledges that no constitutional rights, even fundamental ones, are absolute. But what are some of the instances where we ought to be wary of making it too hard for a State to become involved in the parent-child relationship? Could you comment on that?

Ms. ROSS. I am sorry. I missed the last part of that sentence.

Mr. CONYERS. Yeah, what are some of the instances where we should be wary——

Ms. ROSS. Oh.

Mr. CONYERS [continuing]. Of making it too hard for a State to become involved in the parent-child relationship? I wanted to ask you that.

Ms. ROSS. Yes. Well, let me begin by just saying something about two of the cases that Mr. Farris used in his testimony today. *Littlefield*, the school uniforms case, and Jacobs, the case that he added in his testimony for this year involving school uniforms, the Court actually said that there was a compelling government interest, even though that wasn't the standard that it needed to use, in school safety and orderliness. And the Court also in Jacobs characterized this sort of dispute, and I am paraphrasing here, but as kind of administrative skirmishes between parents and school systems that did not implicate fundamental rights. So I think the use of that was not entirely on point.

In Jonathan L., the case that Mr. Farris helped to litigate, that received a big victory in the California law, which had previously been understood to bar home schooling unless the instructors were certified, and there the court said, no, actually, you have to allow home schooling, but the case was about dependency in a case where the family had been involved with protective services for 20 years. And there had been sexual abuse and physical abuse, and the trial court, dependency court, said these children have to be in public school so that there are mandated reporters who have contact with them and can protect them from grave danger. That is really what the case is about.

Mr. CONYERS. Thank you.

Thank you, Mr. Chairman, for your time.

Mr. FRANKS. The gentleman from Ohio, Mr. Jordan, is now recognized for 5 minutes.

Mr. JORDAN. I thank the Chairman for this hearing, and I will be brief. I have to—I apologize for being late, and now I am leaving early. The typical schedule around here.

But I just came to thank Ms. Wright and Mr. Farris for their work on this issue and a host of others. We home schooled our children—well, I use the term "we" lightly. My wife did all the work, but we home schooled them, and we used to write $100 check to Mr. Farris' organization, I remember, when being involved in the Home School Legal Defense. So we appreciate tremendously the work you have done in standing up for the rights of families and parents and appreciate you being here today and offering your testimony.

Ms. Ross, I don't know you, or I would have said something nice about you, too, but I appreciate Mr. Farris and what he is working on and Ms. Wright.

And, Mr. Chairman, I have got to run to a quick meeting, and be happy to yield to the Chairman if he needs some time.

Mr. FRANKS. Thank you. I will go ahead and take the time, then.

Thank you, Mr. Jordan.

Mr. Farris, did you have a follow up?

Mr. FARRIS. Yeah, I would to correct the record on the Jonathan L. case. The Jonathan L. decision was not the—Ms. Ross simply

doesn't know the facts. The facts were that the family won in the trial court, and that the trial court had said that the right to home school was an absolute right, and that got the attention of the court of appeals. The court of appeals and—in a dependency matter, where I was not counsel, was unaware of it, no home schooler was aware of it, ruled not only that this family shouldn't home school, but nobody in California should be allowed to home school, and so the rehearing was about that second issue, was whether anybody in California should be allowed to home school, and that was the issue that I litigated. I did the oral argument on the constitutional issues in that case on—on the right of people in general in California. So trying to read that case as case specific to that family is not correct.

The other thing that is important to note, you know, she has focused in the *Littlefield* case as an example, the New Jersey case as an example, of even if the court does say in passing, this also happens to meet the fundamental rights analysis, the fact is, and we have to stare directly in the face, they say the correct legal standard is to treat parental rights as a nonfundamental right. That is the holding of the Fifth Circuit. That is the holding of these other courts. And so their argument in the alternative that, in this particular case, it would even meet the other standard doesn't change the fact that they have changed the standards, and so the reality. The other thing is that on the international debate between Ms. Wright and Ms. Ross, it has not been limited to the Eighth Amendment that they have used, the Convention on the Rights of the Child. The Federal District Court in the Southern District of New York on two occasions has ruled that New York State practices were improper and void as a violation of the Convention on the Rights of the Child, which was binding on the United States under the doctrine of customary international law.

A Federal district judge in Philadelphia used a protocol—an optional protocol to the Convention on the Rights of the Child to rule in a—that that treaty was binding on the United States as customary international law, and neither of those cases were in the Eighth Amendment context. One was an immigration case where there—a parent could be deported, leaving behind a citizen child. The case in Philadelphia was about an American citizen who went and did sexual—sex trafficking in Moldova or some place like that. And he should have been hammered, and the court got the right answer, but they shouldn't have used customary international law to get there, and so the reality is our Federal courts are actively integrating these treaties as customary international law binding upon the United States. The Supreme Court hasn't said so yet, but the Federal lower courts are doing it every day.

Mr. FRANKS. Mr. Farris, I have got just another minute here.

One of the more significant issues here in my mind is whether or not the parents' rights are treated as fundamental. You have emphasized that in a tremendous way, and, of course, this is what the courts, even though they perhaps have come to the right decisions in the long run in changing this scrutiny, this test, it occurs to me that we might look to see if there are cases out there or other instances out there where the diminishment of this scrutiny, what—do you know of any other tests or cases that are out there

or anything like that where they are taking advantage of this diminished scrutiny? Any one.

Mr. FARRIS. Yes, I can supplement the record with a list of cases. The fairest way to describe—in fact, if you look at the legal literature as well—is we are in disarray. We are in a state of flux. The courts don't know what the correct standard is. *Troxel* was a splintered case with six different opinions, and the California Court of Appeals reviewed it. So, you know, we can all opine on what we think it means, but in practice, the courts are looking at it, and they are opining on what they think *Troxel* means, and the courts are concluding that *Troxel* has jettisoned the fundamental rights, strict scrutiny standard. Only one Justice, Justice Thomas, used the strict scrutiny standard, and—in that case, and, you know, Justice Scalia said these are not legally protected rights at all, and so—and there is a growing body of judiciary—members of the judiciary that agree with that. So we are—we are in real trouble if we apply reasonable projection to where we are going and looking at the signs what the judges are saying.

Mr. FRANKS. Thank you.

And I would now recognize, finally, the gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Farris, it is my understanding of your testimony that you believe that the standard—that the parental rights are in fact protected, but the only question is whether that decision is made on the basis of strict scrutiny or intermediate scrutiny or rational basis, but basically, the rights are there.

Mr. FARRIS. Correct. If it is a nonfundamental right on the rational basis test or limited scrutiny, it is the same as the right to own a blue car. Or, you know, it is a basic liberty interest that everybody has for every decision in their life, and I think the parental rights deserve a higher protection than a nonfundamental rights standard.

Mr. SCOTT. And you are going to provide us with cases where the fundamental right was not protected?

Mr. FARRIS. Yes. We can provide you with additional cases. My 2012 testimony gave you about 25 of those, and I can supplement that with additional ones. There are a few in my testimony today, but the fairest example is that it is confused, and there is a lot of confusion out there——

Mr. SCOTT. Are there any cases where the parental rights coincided with the best interest of the child and those rights were not protected?

Mr. FARRIS. Well, Mr. Scott, no, because the best interest of the child is not an answer to a what question, what is in the best interest of the child, even though we think of it that way. It is a who question. The best interest of the child is essentially a dispositional standard in our system in that we don't get to the best interest standard, if we are going to follow traditional rules, until after there has been a predicate finding that the parents have harmed the child or the marital relationship is broken. There has got to be something broken about the relationship before you impose that standard.

There is a Washington case——

Mr. SCOTT. You mean if the parents are doing something that is not in the best interest of the child, when should that be protected?

Mr. FARRIS. Mr. Scott, the best interests of the child standard is—the way it has traditionally worked, step one, you make a finding that the parent has harmed the child, and when that happens, then the parent's right to make the decision is forfeited, or at least limited. At that point, then the court steps in and says, what do I think is in the best interest of this child? This parent is forfeited in the medical care of this child. Now I have got to decide is it this doctor or that doctor or another doctor, and it is—and it is a decision about who makes the decision, and so if the parent refused to get the child medical care and they clearly had cancer, as an example, the judge is not only going to say, you've got to have treatment. The judge is going to pick the doctor, because he has to at that stage.

Mr. SCOTT. Well, let me back up a step, because we are kind of slipping on this.

Are there any situations where the best interest of the child are being violated and this constitutional amendment will protect the violation of the best interest of the child?

Mr. FARRIS. Mr. Scott, I don't mean to be contentious, but the best interest of the child is not a standard that is the kind of standard that you violate or not. It is an implementation standard. It is saying, should I send the child to this——

Mr. SCOTT. Well, we are going to have to disagree on this, because if you are violating the best interests of the child, either this constitutional amendment will protect those—that violation or it will not.

Mr. FARRIS. The way I would word it, Mr. Scott, is that if the parent is harming the child, this amendment will not allow parents to harm their children. And the——

Mr. SCOTT. Where is that in the constitutional amendment?

Mr. FARRIS. Where does it say that?

Mr. SCOTT. Yeah.

Mr. FARRIS. In section 3, that the government interests of the highest order. That is the recognized traditional standard. When can the government override the wishes of the parent? When there is an interest of the highest order. Child abuse is an interest of the highest order. The government can intervene for child abuse or neglect. This is right out of *Yoder*. This has been the law for a long, long time, and the child welfare system works just fine in ferreting out—well, usually works fine, but the principles work fine even if all the factual cases don't work out that well, and so then all we are doing is enshrining the——

Mr. SCOTT. Let me just get back to the basics. If the parents are violating the best interests of the child, this constitutional amendment will have no effect. Is that your——

Mr. FARRIS. If the parents are harming the child, this amendment will have no effect.

Mr. SCOTT. Okay. Ms. Ross, is that your reading of the amendment?

Ms. ROSS. No. First of all, we would have to define "harm." That will not be an easy matter. The *Yoder* standard came up under religious exercise, the quote with which the Chairman—Mr. Chair-

man, opened the hearing was directed to religious exercise. That is no longer the constitutional law since the Supreme Court's 1990 decision in Smith, and I think that some part of the motivation behind this amendment may be dissatisfaction with the lesser protection accorded under the exercise clause, which used to give parents a lot of room to determine the needs of their children that might or might not serve best interests.

I also want to say in response to your question that more than 40 percent of the children in the United States today are born outside of marriage. We have no reason to assume that their parents will be able to agree on anything about how to raise these children. And the amendment does not deal with that social reality, because between two parents who disagree about how to educate their child, whether the child should see a doctor alone, any number of disputes that an intact family gets to make without intervention so long as the child is not harmed, somebody is going to have to break those ties, and that somebody is, unfortunately, very likely to be a judge under our entire framework of family law.

Mr. FRANKS. Thank you, Mr. Scott.

I now recognize Mr. Johnson for 5 minutes.

Mr. JOHNSON. Thank you, Mr. Chairman.

Language in the resolution states the following, "The amendment"—well, no, not quote, but the amendment states, "Shall not be construed to apply to a parental decision that would end life."

Does that part of the statute that you are proposing, sir, does that assume that life begins when the sperm fertilizes the egg?

Mr. FARRIS. Mr. Johnson, I had a hand in drafting this language overall. I did not have a hand in—I was not the force behind this particular section, that was the National Right to Life Committee that insisted on this being added.

Mr. JOHNSON. And what that means, because it is premised on the assumption that life begins when the sperm fertilizes the egg, is that——

Mr. FARRIS. Whether—whether it does or not, the—what the——

Mr. JOHNSON. Well, would you give your legal opinion to us as to whether or not it is based on that assumption?

Mr. FARRIS. The committee can make the record so the original meaning of the text can be ascertained. I don't know.

Mr. JOHNSON. Okay. Let me ask you——

Mr. FARRIS. But let's assume that it does. Let's make that assumption.

Mr. JOHNSON. If we assume that it does, then it would ban—it would not enable a woman to make a choice to terminate a pregnancy.

Mr. FARRIS. No, Mr. Johnson, with all due respect, what this is saying, it "shall not be construed to apply," meaning if you are going to make decisions about abortion, you got to look to other sources of law. It is take—the intention behind this is to take the abortion issue out of the zone of this amendment. It is designed to say, Kings et——

Mr. JOHNSON. Well——

Mr. FARRIS [continuing]. This doesn't apply.

Mr. JOHNSON. What it actually says is that if life begins at conception, assuming that——

Mr. FARRIS. Right.

Mr. JOHNSON [continuing]. Is the case, then this amendment would specifically exclude the power of a parent to terminate a pregnancy. It would grant a parent more power than parents have now, but it would restrict the ability of a parent, assuming that life begins at conception, it would keep a parent—or it would consistently allow a rule that would ban a parent from exercising their rights, even two parents, deciding that a fetus should not be taken to term for some reason, just like Wendy Williams down in Texas running for Governor——

Mr. FARRIS. Mr. Johnson, I assure you that that is not the intention. If this language does not accomplish that objective——

Mr. JOHNSON. But that is what the language says.

Mr. FARRIS. The language says, It shall not be construed to apply, meaning that this article, the whole section, is inapplicable in the area of abortion. That was the intention behind it. And if it doesn't say that——

Mr. JOHNSON. Well, it would provide for an exclusion from the protection to parents that this amendment to the Constitution would offer in so far as it would exclude a parent's ability to terminate a pregnancy.

Mr. FARRIS. With all due respect, I don't read it that way. That is not its intention. What it would do, it basically says if you are arguing that a parental consent law should be supported, this amendment won't help you, because we have excluded the subject matter. It is intended to be a subject matter exclusion, and if your—if we can win your vote on clarifying this language, I know that we can clarify the language to your satisfaction. If that is the only problem that we have got, we can fix it so that—that—because what you want—what you appear to want and what I appear to want on this issue is we don't want this amendment entering into the abortion discussion at all.

Mr. JOHNSON. Well, it is. I view it as a poison pill to the passage of this particular resolution for those who believe that women should have a right to choose.

Mr. FARRIS. I would hope that we could find language that would accomplish our mutual objective. I don't want this amendment getting wrapped into the abortion dispute one way or the other.

Mr. JOHNSON. Well, by giving the National Right to Life group the ability to insert this clause into the legislation has done exactly what you don't want it to do.

Mr. FARRIS. I understand.

Mr. JOHNSON. I would also ask whether or not that same language, does it mean that parents wouldn't have the right to determine whether or not to take their child off of life support?

Mr. FARRIS. It would—it would say that you have to look to other sources of law on that question. That is what it is intended to say, and so if State law or Federal constitutional law of another sort or another source answers the question, then that is where you look to find the answer. It is intended to not give an answer one way or the other on life-ending decisions, whether they are prebirth or post birth. It is intended to say, We are not dealing with that subject matter.

Mr. JOHNSON. Well, again, you are granting parents some rights, unspoken rights, with this constitutional amendment, but at the same time, you are excluding a category of parental rights that has already been well entrenched in the law.

Mr. FARRIS. Right. We are trying not to affect that area of law and let that area of law develop independently and on its own. If that changes—you know, if *Rowe v. Wade* is repealed by judicial decision or by acts of Congress, that happens on its own. We are trying to stay out of that fight.

Mr. JOHNSON. I don't see how you can do it with the legislation as written. I just really——

Mr. FARRIS. I wish it wasn't there, but I don't think it means—it certainly does not—it is not intended to mean what you are—what you are wondering.

Mr. JOHNSON. Well, that is a clear——

Mr. FARRIS. If we can fix the language——

Mr. JOHNSON. A clear reading of the language, I believe, would support my interpretation of it. I don't see how it could support any other—there is no other reasonable analysis.

Thank you, Mr. Chairman.

Mr. FRANKS. Yes. Thank you, sir.

And, you know, this is a subject of profound importance. You know, more than any other mortal paradigm, I suppose, the ideals and information educationally, spiritually, academically, the ideals that we inculcate in the hearts and minds of our children dictate the future of the human race in the most profound way. And so it is a subject of great importance. And the real question here that has been examined is who has the primary and fundamental right to inculcate those principles and that education and those truths. And we had better choose carefully, because the implications have an expressible gravity.

And with that, I would thank all of the panelists for joining us today. Very interesting hearing, to say the least.

Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record. And, again, I want to thank everyone that joined us today and all the audience, and this hearing is adjourned.

[Whereupon, at 3:29 p.m., the Committee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Statement of the Honorable Steve Cohen for the Hearing on "Proposing an Amendment to the Constitution of the United States Relating to Parental Rights" Before the Subcommittee on the Constitution and Civil Justice

Tuesday, September 9, 2014 at 2:00 p.m.
2141 Rayburn House Office Building

The Supreme Court has long recognized that the right of otherwise fit parents and guardians to make decisions about the upbringing of a child under their care is a fundamental right under the Fourteenth Amendment's Due Process Clause.

Our witnesses seem to agree on this, and on the fact that no constitutional right is absolute.

So the central focus of our discussion today is whether the Constitution should be amended not only to explicitly state that a parent's right to make child-rearing decisions is fundamental, but to enshrine some very specific ideas about the nature and scope of that right into the Constitution.

H.J. Res. 50, the specific proposal before us, would make some potentially dramatic changes to the state of current law and could be harmful if adopted.

As a general matter, amending the text of our Constitution is not, and should not be, a casual matter.

Amending the Constitution every time there is a disagreement over the possible effects of a court decision – which H.J. Res. 50's proponents say is one of the main reasons why a constitutional amendment is needed – weakens the Constitution's basic character as a governing framework, particularly when the concerns driving the change are speculative, as is the case here.

There is a reason why we have amended the Constitution so rarely, and why the Framers made it so difficult to amend.

As a foundational document, the Constitution should certainly not be amended because of policy disagreements or speculative risks.

In a case such as this, where a right is already well-established under the Constitution, and where the purported threats are highly speculative, I would have grave reservations about moving forward with a constitutional amendment.

My concerns are only heightened by the fact that H.J. Res. 50 itself is problematic for several reasons.

First, who would be protected by this amendment? Section 1 provides that the "liberty of parents to direct the upbringing, education, and care of their children is a fundamental right," but does not define who is a "parent."

Does this provision protect guardians or only biological parents? The Supreme Court recognized in *Pierce v. Society of Sisters* back in 1925 that the Fourteenth Amendment protected guardians as well as parents, so if this provision were given its most narrow reading, it would be a significant departure from current law.

Would this provision protect sperm donors but not adoptive parents?

Would this provision protect same-sex couples who were allowed to adopt in one state, but whose adoption is not recognized in another?

Given its most narrow interpretation, H.J. Res. 50 fails to protect the rights of the full spectrum of adults who are legally the primary caretakers of children and does not recognize the diversity of contemporary families and parenthood.

Second, as Professor Catherine Ross testified in her written statement, section 2 could threaten to undermine our public education system by essentially giving any parent the constitutional right to veto any decisions as to how a public school is managed, including choices about curricula, reading assignments, and school activities.

Third, H.J. Res. 50 will change the law in areas that have little to do with parental rights. For example, section 4 provides that this "article shall not be construed to apply to a parental action or decision that would end life."

This language could be interpreted to prevent parents from choosing to have an abortion. Moreover, it contains no exceptions for protecting the health of the mother.

It is no secret that I am strongly pro-choice and I would be seriously concerned about the substance of this language to the extent that it was aimed at reproductive rights.

But whatever one's views on abortion or reproductive rights, such a fundamental change to the law in this area should not be made through a constitutional amendment that ostensibly is designed to protect parental rights.

For these reasons, not only is H.J. Res. 50 not necessary, it is also highly problematic and not worthy of adoption.

Opening Statement for Chairman Goodlatte
Subcommittee on the Constitution and Civil Justice
Hearing on: H.J. Res. 50, "Proposing an Amendment to the Constitution of the United States Relating to Parental Rights"
Tuesday, September 9, 2014 at 2:00 p.m. in Room 2141 Rayburn HOB

I am glad that the Subcommittee on the Constitution and Civil Justice convened today to discuss whether a parental rights amendment to our Constitution is needed. As the Supreme Court stated in the 1972 case *Wisconsin v. Yoder*, the "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."

Indeed, Supreme Court jurisprudence dating back to the beginning of the last century affirms parents' rights to direct the upbringing and education of their children. It is troubling, however, to learn that across the nation, the

rights of parents are being challenged, and sometimes stripped away, by an infringing government.

I want to briefly thank our witnesses for coming today. In particular, I would like to thank Mike Farris. Mike has dedicated his life to fighting for the rights of parents and homeschoolers across Virginia and the United States. His stalwart dedication is a testament to both the sincerity of his beliefs and his desire to preserve the traditions upon which this country was founded.

I look forward to all of the witnesses' testimony.

Prepared Statement of the Honorable Mark Meadows, a Representative in Congress from the State of North Carolina

"Thank you, Chairman Franks, for holding this important hearing and for your leadership on this issue. On behalf of parents across the country, your steadfast support for the Parental Rights Amendment is a huge step forward."

Material submitted by the Honorable Steve Cohen, a Representative in Congress from the State of Tennessee, and Ranking Member, Subcommittee on the Constitution and Civil Justice

STATEMENT

of

THOMAS M. SUSMAN

Submitted on behalf of the

AMERICAN BAR ASSOCIATION

before the

COMMITTEE ON THE JUDICIARY
SUBCOMMITTE ON THE CONSTITUTION AND CIVIL JUSTICE

UNITED STATES HOUSE OF REPRESENTATIVES

for the hearing on

on

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

September 9, 2014

1050 Connecticut Ave. NW, Suite 400 • Washington, DC 20036
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I am Thomas M. Susman, Director of Governmental Relations for the American Bar Association. Thank you for the opportunity to share the ABA's views on proposals for action by Congress to address parental rights. The ABA is the world's largest voluntary professional organization, with a membership of nearly 400,000 lawyers worldwide. The ABA continuously works to improve the American system of justice and to advance the rule of law in the world.

The ABA has long worked to strengthen families and improve parental protections and resources, and it has many formal policies approved by the Association's House of Delegates intended to sustain and fortify parent-child relationships. While we have not yet taken a position on the efficacy of a constitutional amendment to protect or define parental rights, we believe there is no shortage of sound policy reforms that Congress can currently act upon through the ordinary legislative process to enhance the rights and responsibilities of parents and to support parent-child relationships.

We have articulated a number of policy recommendations that focus on what Congress can do to provide enhanced parental support when children are placed in foster care. When state or county child welfare agencies become involved with families, the ABA has called upon Congress to encourage keeping or reunifying children safely with their birth parents by increasing the amount and flexibility of funding available for family preservation, and the Association has urged enhanced federal support for family reunification services. The ABA believes such services to parents should include direct access or connection to programs for affordable housing, anti-poverty supports, peer parent support programs, and quality parent legal representation programs. The ABA has also urged Congress to reform the system of financing state child welfare systems, through incentivizing safe and stable parent-child reunifications and rewarding states for increasing their rates of safe and stable reunifications of children in foster care with their parents.

The ABA has long called for improvements in the provision of legal counsel for parents when the parent-child relationship is potentially affected by court action. Therefore, the Association supports the Congressional enactment of H.R. 1096, the *Enhancing the Quality of Parental Legal Representation Act of 2013*, sponsored by Rep. Gwen Moore (D. WI-4). This bill would help provide quality representation for parents who are involved in the child welfare system, through funding to each state's federally-supported Court Improvement Program.

In 1987 the ABA first called for laws that ensure competent attorneys are appointed for every indigent parent at all stages of state-initiated child protection proceedings, and that all attorneys receiving such appointments have sufficient training or experience to provide effective representation to parents. The ABA adopted *Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases* in 2006 to help assure that parents involved with the juvenile courts in cases involving allegations of abuse and neglect receive that competent representation. The Association has also called for provision of legal counsel to low income

parents as a matter of right and at public expense in any adversarial proceedings involving child custody disputes.

The ABA has addressed the legal rights of parents involved with government child protection agencies through numerous mechanisms. There have been several ABA projects, and related policies focused on enhancing support for these parents. For example, the ABA sponsors the *National Project to Improve Representation for Parents Involved in the Child Welfare System*. Through this work, the Association strives to improve outcomes for children and their parents and gives parents a stronger voice in the court system. The ABA has defined high quality representation by developing Association-approved *Standards of Practice*, and it works with states and local jurisdictions to ensure that all attorneys who represent indigent parents meet this definition.

The ABA also designated each June as *National Reunification Month*, which celebrates the important accomplishments of parents, and the many professionals that support them, in getting their children home safely from foster care. The Association hopes Congress will act to bring broader attention to parental reunification work by officially designating each June as a Congressionally-recognized National Reunification Month.

Other ABA policies have supported parents involved with the law in a variety of different contexts.

For example in 2012 the ABA supported the *Uniform Deployed Parents Custody and Visitation Act*, promulgated by the National Conference of Commissioners on Uniform State Laws, which protects the parental rights of military member parents under deployment. Hundreds of thousands of children of military families, under the age of five, are separated from their mother or father due to military assignments. This continues to be a topic worthy of greater Congressional attention.

Several million children have a parent in jail or prison at any given time, with severe adverse consequences to their health and well-being. In 2010 the Association called upon Congress to help protect parental rights when parents are incarcerated, through support of initiatives that facilitate contact and communication between parents in correctional custody and their children, and the Association has urged elimination of restrictions that prohibit recipients of Legal Services Corporation funds from providing legal assistance to incarcerated parents on family law issues. The Association also strongly supports federal support for prisoner reentry programs that begin with assessment of prisoners when they enter jail or prison, include support for maintaining visitation with minor children and adequate and affordable phone access while in confinement as well as family reunification services upon release.

The ABA recognizes that international law regarding parental rights and responsibilities is important, and thus the Association has called upon the Senate to give its advice and consent to ratification of the *Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement*

and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. The ABA has also called upon Congress to enact legislation to permit the United States to fully and uniformly implement that Convention, which concerns custody matters and other measures taken for the protection of children and their property, and for the protection of parental rights.

Government child support programs serve half of all our poor children and their families. The ABA has a long history of supporting improvement of laws that help parents receive the child support to which they are entitled. The ABA has urged Congress to pass legislation to ensure uniform laws and procedures in child support cases (such as the *Hague Convention on the International Recovery of Child Support*), to require new employees to report child support obligations and payment through withholding, to require employers to honor income withholding orders, to establish a national network for the exchange of locate information for the establishment, enforcement and modification of support orders, for the enforcement of visitation orders, for establishment of minimum staffing standards for child support agencies, for improved training for those involved in child support enforcement, for required laws and procedures for civil voluntary parentage acknowledgment, and for strengthening enforcement remedies against the self-employed.

Each year, it has been estimated that over a hundred thousand parents are victims of custodial interference by another parent or family member. On the topic known as parental kidnapping, a practice that results in parents being unlawfully deprived of their child's custody and visitation rights, the ABA has done considerable work, addressing both domestic and international custodial interference and child abduction, and the Association has called upon Congress to enact legislation establishing a national computerized child custody registry that would aid in protecting parental custody rights. The ABA also supports a variety of Congressional actions to protect parents from domestic violence.

It is well-recognized that America stands behind most of the rest of the industrial world in providing assured job leave for working families. The ABA supports establishment of a reasonable Federal minimum requirement for job-protected parental leave to allow parents to take unpaid leave on full or part-time basis to provide child care for newborn infants, newly-adopted children, and seriously ill children, and the Association has said this should include the continuation of existing health benefits during such periods of leave.

It is essential for America's future economic prosperity that our young children receive quality, developmentally appropriate care while their parents are working. To aid working parents in securing necessary child care, the ABA has called for Federal legislation designed to provide creative mechanisms for extending the availability and affordability of quality child care, such as the expanded use of tax incentives to parents who purchase child care services or to employers who provide child care services or related benefits to employees, tax credits to child care center

operators, and the targeting of increased public social services funds for the support of a variety of child care programs.

The ABA looks forward to continuing to work with Congress on using Federal law to enhance the safety, permanency, and well-being of families through supporting both parents and their children. Thank you for your consideration of our views.

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FIRST FOCUS
CAMPAIGN FOR CHILDREN

First Focus Campaign for Children
Statement for the Record

U.S. House Judiciary Committee
Subcommittee on the Constitution and Civil Justice
"Proposing an Amendment to the Constitution of the United States Relating to Parental Rights"

September 9, 2014

Chairman Franks, Vice-Chairman Jordan, and Members of the House Subcommittee on the Constitution and Civil Justice, we thank you for the opportunity to submit this statement for the record in response to the hearing entitled "Proposing an Amendment to the Constitution of the United States Relating to Parental Rights." The First Focus Campaign for Children (FFCC) is a bipartisan organization advocating for legislative change in Congress to ensure children and families are a priority in federal policy and budget decisions. Our organization works on a wide range of policy issues impacting children, including education, health care, family economics, and human rights. Our child rights portfolio is dedicated to ensuring that children's fundamental rights in the Constitution are protected and that policy decisions made at the state and federal level reflect the best interest of the child standard.

We have serious concerns about adopting the Parental Rights Amendment (PRA) as part of the U.S. Constitution as we believe it threatens to undermine the fundamental rights of children. Section 1 of the PRA gives parents fundamental rights in the decision making of their child's upbringing, education and care. We agree that parents should have a primary role to play in these critical decisions, and have actively advocated in the past for protecting such rights, particularly in cases when parents' decision-making capabilities are threatened by lack of sufficient cultural competency or when a parent has been detained or deported by immigration authorities. We also strongly believe that the family unit is critical to a child's healthy development and have advocated for measures that promote family unity in our efforts to reform the state child welfare system and federal immigration system. However, we also firmly believe that the viewpoint of children who are affected by critical decisions must also be taken into consideration (accounting for their age and other capabilities) in certain decisions, such as when that child is a potential victim of trafficking, abuse, neglect, and maltreatment. Creating a fundamental right for parents in these decisions would create an extremely high and potentially dangerous burden to overcome- both for the child and the government even when there are legitimate instances of concern over a parent's judgment, such as evidence of abuse or neglect.

Section 2 of the PRA grants parents the right to "choose public, private, religious or home schools, and the right to make reasonable choices with public schools for one's child." Public schools must consider policies that have the best educational outcomes for all of its students and may have difficulty achieving

that goal if parents are allowed to pick and choose each activity their child will participate in school. First Focus recognizes the importance of parental engagement in a child's education, but we also believe that schools must be given sufficient authority to develop learning plans and practices that are designed to meet a child's unique academic and developmental needs. Furthermore, many jurisdictions already give great deference to the rights of parents in making decisions regarding their children rendering the PRA redundant and inflexible. Similarly, Section 4 articulates that the PRA cannot be "construed to apply to parental action or decision that would end life." Federal and state laws already criminalize parental acts that endanger or cause the death of their child's life.

Finally, Section 5 seeks to diminish the principles of international law that may affect the application of the PRA. However, treaties do not have the power to supersede the U.S. Constitution and ratification is conducted through legislation. While adoption of the PRA may not directly obstruct potential U.S. ratification of the UN Convention on the Rights of the Child, we are concerned that it may make ratification more difficult. The First Focus Campaign for Children has been an avid supporter of U.S. ratification of the Convention on the Rights of the Child (CRC) as we believe the treaty could help guide the development of U.S. laws and policies, as well as critical budget decisions, to ensure that they reflect the best interests of children and promote their healthy development. In fact, the CRC can help promote the critical role of parents and the family unit in a child's life, including but not limited to Article 5 (the responsibilities, rights, and duties of parents), Article 9 (non-separation from parents against their will), Article 10 (family reunification) and Article 14 (the right of parents to provide direction on freedom of thought, conscience, and religion). Moreover, numerous positive outcomes in the lives of children worldwide have been cited since the UN adopted the CRC including a drop in the number of under-five deaths, an increase in testing newborns and infants testes and given medication to protect them from diseases and more children having access to education throughout the world. As it stands, only Somalia, South Sudan and the United States are not parties to the Convention.

We thank you again for the opportunity to submit this statement for the record and respectfully urge you not to adopt the Parental Rights Amendment. Unfortunately, children are too often left out of policy discussions which directly impact them, often to their detriment. Thus, we recommend that Congress work across the aisle to develop legislative solutions that will strengthen the rights of *both* parents and children. The First Focus Campaign for Children is actively working on such proposals, and look forward to working with Congress on advancing such solutions. At a time when child well-being is in dire need of improvement in the United States, and with pressing issues facing vulnerable homeless children as well as children in foster care and children entering the country as refugees, these solutions are desperately needed.

Should there be any questions regarding this statement, please contact Wendy Cervantes Vice President, Immigration and Child Rights at wendyc@firstfocus.net or (202) 657-0678 or Rucha Mathur, Policy Research Associate & Program Manager at rucham@firstfocus.net or (202) 999-4852.

U.S. HOUSE OF REPRESENTATIVES

COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

SEPTEMBER 9, 2014

Testimony of

Jonathan Todres
Professor of Law
Georgia State University College of Law
Atlanta, Georgia

"Hearing: Proposing an Amendment to the Constitution of the United States Relating to Parental Rights"

Chairman Franks and distinguished Members of the Subcommittee:

I would like to thank the Subcommittee on the Constitution and Civil Justice for the opportunity to submit this written statement. I appreciate the Subcommittee's thoughtful consideration of this issue.

Although I support the principle that government should not interfere with parents' rights to raise their children absent a finding of harm, I believe the current proposed amendment is not needed and may create adverse unintended consequences for children and parents.

Let me begin by briefly noting my background. I am a Professor of Law at Georgia State University College of Law. My research focuses on legal and policy issues affecting children's rights and child well-being. I have published more than 40 academic articles and book chapters, the vast majority of them on issues related to children's rights and child protection. I co-edited the book *The U.N. Convention on the Rights of the Child: An Analysis of Treaty Provisions and Implications of U.S. Ratification* (Brill Academic Publishers 2006), which is the most recent book assessing in detail the potential implications of U.S. ratification of this treaty. I also have conducted extensive research on issues of child trafficking and commercial sexual exploitation, and as part of that research, I have actively participated in the two reviews of the U.S. government under the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography, which the United States ratified in 2002.

My comments today will cover the following issues: (1) the U.S. approach to amending the Constitution; (2) the underlying concern behind the proposed amendment; and (3) the potential unintended consequences of the proposed amendment.

I. U.S. APPROACH TO AMENDING THE CONSTITUTION

Constitutional amendments are rare in our history. Not including the Bill of Rights, which was ratified in 1791 as part of the original agreement leading to the Constitution, there have been only seventeen amendments to the Constitution, and only twelve since 1870. Constitutional amendments have been employed to correct such wrongs as the denial of voting rights for women (the 19th Amendment) or to change government structure (e.g., the 22nd Amendment, which set a two-term limit for the President). In such cases, a constitutional amendment existed as the only possible remedy to an otherwise intractable problem—either because the Supreme Court had already held that the Constitution dictated an opposite result or because the constitutional structure itself required the revision. The situation before us today is very different. In the case of parental rights, there is a longstanding and robust Supreme Court jurisprudence supporting parents' rights to raise their children.[1] The Supreme Court has affirmed that "the interest of parents in the care, custody, and control of their children" are "perhaps the oldest of the fundamental liberty interests recognized by this Court."[2]

Pursuing a constitutional amendment to affirm existing Supreme Court decisions would be a departure from our constitutional approach and would open the door to many other proposed, and arguably superfluous, amendments. Parental rights within the family are important and, as a result, already garner broad support both in Supreme Court jurisprudence and among the American public. Such circumstances do not comport with the justification typically required to mandate a constitutional amendment.

II. ADDRESSING THE PRIMARY CONCERN UNDERLYING THE PROPOSED AMENDMENT

When the proponents of the parental rights amendment first initiated their campaign, they expressed concern regarding the potential impact of the Convention on the Rights of the Child (CRC) in the United States.[3] Although it is understandable that any parent would have questions about the potential impact of a law or treaty on his or her family (and I would be happy to submit supplemental responses to any questions about specifics of the CRC), the assertion that the CRC is a threat mischaracterizes both the U.S. approach to international law and the mandate of the Convention on the Rights of the Child.

First, the U.S. approach to ratification of human rights treaties historically has been to deem them non-self-executing. This means that Congress would have to adopt implementing legislation before the treaty has domestic effect. In other words, the United States gets to decide how it would implement the CRC, or any other human rights treaty for that matter. Although the

[1] The testimony submitted by Professor Martin Guggenheim to this Subcommittee on July 18, 2012, for the Subcommittee's hearing on the parental rights proposed amendment details the lengthy Supreme Court jurisprudence in support of parents' rights. Rather than revisit that history again, I provide a link to his testimony: http://judiciary.house.gov/_files/hearings/Hearings%202012/Guggenheim%2007182012.pdf

[2] Troxel v. Granville, 530 U.S. 57, 65 (2000).

[3] Proponents of the proposed amendment have since expanded their opposition to other human rights treaties.

U.N. Committee on the Rights of the Child is responsible for overseeing implementation of the treaty, it has no legal authority to compel the U.S. or any other government to change its laws. Under the CRC, the U.N. Committee's authority is limited to reviewing reports by states parties to the treaty and issuing recommendations.[4]

We have seen this review process play out twice with the Committee on the Rights of the Child and the U.S. government. As noted earlier, the United States is a party to the Optional Protocol to the CRC on the Sale of Children, Child Prostitution, and Child Pornography.[5] It has been reviewed twice—in 2008 and 2013. On both occasions, I participated in preparing a report by non-governmental organizations (led by ECPAT-USA) submitted to the Committee on the Rights of the Child and presented testimony to the U.N. Committee in Geneva. Both reviews helped to highlight strengths in U.S. federal and state law and to identify opportunities to further improve our law and practice for the benefit of at-risk and exploited children. Ultimately, after the U.N. Committee issued its recommendations, the decision on how to move forward was in the hands of Congress and the states. And we have seen that federal and state law on the trafficking of children has improved significantly in recent years. Nothing in the review process has hindered that. To the contrary, I believe the process has helped identify appropriate steps to protect children.

As to the CRC itself, historical perspective is important in understanding the treaty. The negotiations on the CRC took place during the 1980s, with significant involvement by the Reagan and Bush Sr. Administrations. Indeed, the U.S. delegation arguably contributed more than any other country to the development of the treaty.[6] The U.N. General Assembly unanimously adopted the CRC in November 1989. At that time, President Bush's representative to the United Nations noted that the U.S. Government could support the final draft of the CRC because it recognized parents' rights as well as the civil and political rights of children, and focused on individual rights rather than centralized government control.

The CRC rapidly became the most widely adopted human rights treaty in history, ratified by nearly every nation in the world, including staunch U.S. allies like the United Kingdom, Germany, Canada, Australia, and Japan. President Clinton signed the treaty in 1995; but almost 20 years later, it still has not been transmitted to the Senate for consideration.

The CRC does not impose children's rights over parents' rights and responsibilities, and it does not provide any basis for the United Nations to dictate to parents how to raise their children. As a parent, if it did, I would not support it. The CRC itself recognizes the family as "the

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[4] A third optional protocol to the CRC, which entered into force in April 2014, establishes a communications procedure, but the Committee's authority to receive individual communications does not separately exist under the CRC itself. Currently, only eleven countries have ratified the third optional protocol. The U.S. has not signed it.

[5] The United States is also a party to the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict.

[6] *See* Cynthia Price Cohen, *Role of the United States in Drafting the Convention on the Rights of the Child: Creating a New World for Children*, 4 LOY. POVERTY L.J. 9, 25-26 (1998) ("The United States was by far the most active, making proposals and textual recommendations for thirty-eight of the forty substantive articles."); Cynthia Price Cohen, *The Role of the United States in the Drafting of the Convention on the Rights of the Child*, 20 EMORY INT'L L.REV. 185, 190 (2006) (noting that the U.S. influenced the text of nearly every article of the CRC and that "U.S. influence was so strong that some people referred to the Convention as the 'U.S. child rights treaty.'").

fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children" and mandates that "States Parties shall respect the responsibilities, rights and duties of parents or, where applicable,... legal guardians or other persons legally responsible for the child" to direct the upbringing of the child.

Further, the foundational principle of the CRC—the best interests of the child—is very familiar to the United States as it has been used in U.S. courts for more than a century.[7] The notion that any federal or state court would ignore more than one hundred years of U.S. jurisprudence and rely only on a non-binding statement by a U.N. committee is implausible. Furthermore, that unfounded assertion implies the best interests of the child standard of the CRC necessarily dictates a different result from U.S. jurisprudence, a claim that is debatable at best. The reality is that the CRC's best interests of the child standard allows each country to decide what is best for children. In the United States, the Supreme Court has consistently affirmed that children are best off with their parents, unless the children are being subjected to abuse or neglect.

The question of treaty ratification should be taken seriously and spur a thoughtful review. Ultimately, if the United States elects to ratify the CRC, as every other country in the world has done except Somalia and South Sudan, the U.S. would submit appropriate reservations, understandings and declarations that would ensure the treaty is ratified in such a way as to fit within our Constitutional framework and our system of federalism, just as it has done with other treaties it ratified.

III. POTENTIAL UNINTENDED CONSEQUENCES OF THE PROPOSED AMENDMENT

As the prior two sections detail, any questions on this issue regarding the Supreme Court's jurisprudence, the CRC, or any other treaty do not necessitate a constitutional amendment. Further, the proposed amendment might have unintended consequences, including ones that could limit the rights of some parents to direct the upbringing of their child. The proposed amendment states that "No treaty may be adopted nor shall any source of international law be employed to supersede, modify, interpret, or apply to the rights guaranteed by this article." The United States is a party to the Hague Convention on the Civil Aspects of International Child Abduction and has adopted implementing legislation, the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. § 11601 *et seq.* This treaty has been relied upon in numerous cases to protect a parent's right to have his or her abducted child returned home so that the parent can raise the child as he or she sees fit.[8] A constitutional amendment that bars any application of international law might render many children at greater risk of harm and leave their parents without adequate rights to seek their children's return.

The United States is also a party to the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption. This Convention has provided a framework to

[7] *See* Lynne Marie Kohm, *Tracing the Foundation of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. & FAM. STUD. 337, 376 (2008) (stating that "[r]ather than being a recent legal phenomenon of the past few decades, the [best interests of the child] doctrine has been developed and rooted in American family law jurisprudence for the past two hundred years").

[8] A search of Westlaw on September 8, 2014, identified 1,003 cases in federal and state courts that referred to the Hague Convention on the Civil Aspects of International Child Abduction. The volume of cases indicates that we need to proceed carefully before we bar any use of this Convention through a constitutional amendment.

facilitate safe adoptions between participating countries. Again, if international law is barred from applying, the rights of adoptive parents could be put in jeopardy, and children could be at heightened risk.

These are only two examples of how specific international laws can help protect the rights of parents.

To be clear, I do not suggest these examples mean international law should be used without limitation. The right to direct a child's upbringing should, and does, reside with parents first and foremost. Law—whether international, federal or state—should proceed cautiously in this area. My point is that when it comes to international law, the United States needs a more nuanced approach to deciding what law can apply. That more nuanced approach is the very essence of the treaty ratification process. The treaty ratification process—including deciding whether to become a party, consideration of appropriate reservations, understandings, and declarations, and development and adoption of implementing legislation—allows the United States to assess the merits of each treaty without inadvertently putting children at risk or parents' rights in jeopardy.

CONCLUSION

Ensuring the wellbeing of every child is a concern shared by parents and policymakers. I support the efforts of this Subcommittee and the Congress to examine how the United States can best support parents and families so that every child has the opportunity to grow and develop to his or her fullest potential. For the reasons discussed above, this proposed amendment is not the way to achieve that.

Thank you very much.