
Congress of the United States
House of Representatives
Committee on the Judiciary
Constitution Subcommittee

The Parental Rights Amendment



Testimony of

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July 18, 2012

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

APPENDIX

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

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

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

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

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

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

Price v. New York City Bd. Of Educ., 51 A.D.3d 277, 292 (A.D. N.Y. 2008) (holding that “even if we were to hold that a fundamental liberty interest is at stake [because of a school rule prohibiting students from having cell phones], we would not apply strict scrutiny” because “there is no clear precedent requiring the application of strict scrutiny to government action which infringes on parents’ fundamental right to rear their children” given that *Troxel* “did not articulate any constitutional standard of review”).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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