

House of Representatives Committee on the Judiciary

Subcommittee on the Constitution

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

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Testimony of Professor Martin Guggenheim

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Mr. Chairman, distinguished members of the subcommittee:

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

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

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

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

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

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

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

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

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

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

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<sup>1</sup> *Stanley v. Illinois*, 405 U.S. 645, 651 (*quoting* *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (*quoting* *May v. Anderson*, 345 U.S. 528, 533 (1953)).

<sup>2</sup> *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

<sup>3</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

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

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

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

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

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

The Court wrote:

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<sup>4</sup> Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

<sup>5</sup> *Id.*

<sup>6</sup> 262 U.S. 390 (1923).

<sup>7</sup> *Id.* at 399.

<sup>8</sup> *Id.* at 402.

<sup>9</sup> 268 U.S. 510 (1925).

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children. . . . The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.<sup>10</sup>

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

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

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

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

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<sup>10</sup> *Id.* at 535.

<sup>11</sup> *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

<sup>12</sup> *Stanley v. Illinois*, 405 U.S. 645 (1972).

<sup>13</sup> 530 U.S. 57 (2000).

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

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

More than 75 years ago, in *Meyer v. Nebraska*, 262 U.S. 390 (1923), we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own." Two years later, in *Pierce v. Society of Sisters*, 268 U.S. 510, 534–535 (1925), we again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." We explained in *Pierce* that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.*, at 535. We returned to the subject in *Prince v. Massachusetts*, 321 U.S. 158 (1944), and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Id.*, at 166.

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

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<sup>14</sup> *Id.* at 65.

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

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

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

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

Thank you very much.

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<sup>15</sup> *Id.* at 65-66.

<sup>16</sup> <http://fatherhood.hhs.gov/charting02/introduction.htm#Who>