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.

---

[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.