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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 responsibility 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]

<u>The Amendment threatens radical legal change</u>

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.

<u>The Constitution should never be amended absent a pressing need</u>

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.