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An organization exists specifically to defend parental rights, and pass an amendment to the US Constitution codifying them!

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Parental Rights IN BLACK & WHITE

From the March/April 2006 *Court Report* Cover Story

Parental Rights: Why Now is the Time to Act

> *Want of foresight, unwillingness to act when action would be simple and effective, lack of clear thinking, confusion of counsel until the emergency comes, until self-preservation strikes its jarring gong—these are the features which constitute the endless repetition of history.*—Winston Churchill, speech, House of Commons, May 2, 1935.[i]

There were early warning signs that homosexual "marriage" should be taken seriously. On May 27, 1993, the Supreme Court of Hawaii ruled that it was unconstitutional to deny marriage licenses to three same-sex couples. A voter initiative eventually trumped this decision, but at least by this date the battle was fully engaged.

Additional Resources

Michael Farris' 2006 National Conference Speech: Protecting Parental Rights: Why It Should Be a Priority

The Onslaught of International Law: Can America Protect Parental Rights?

A Dangerous Path: Has America Abandoned Parental Rights?

Yet, the responses of the pro-family community, judged with the aid of 20/20 hindsight, have to be regarded as too little, too late. Homosexual marriages are now being performed in this nation. And while there have been a number of successful efforts to place traditional marriage language into state constitutions, efforts to bring in a federal constitutional amendment are essentially stalled. Even more troubling is the fact that the momentum in the legal system is moving rapidly in the direction of declaring homosexual marriage a federal constitutional right. If this happens, all state constitutional efforts will be for naught.

A friend in Congress recently told me that if the issue had been brought to the floor of the House 15–20 years ago, there is no doubt that a constitutional amendment to ban same-sex marriage would have passed. There is substantial doubt that such an amendment will ever pass at this point.

The pro-family movement waited until Congress believed there was a real problem before attempting a constitutional solution, even though legal experts have been united for nearly a decade in saying that the only way to stop the courts' march toward homosexual marriage is with a federal constitutional amendment. By now, our opponents have gained so much strength in both law and culture that the prospects for the right solution are daunting at best.

This article is about the need to save parental rights. I use the story of the battle to save marriage solely as a cautionary tale. The threats to parental rights are real and growing. And we must face the fact that the right of parents to direct the upbringing and education of their children is not explicitly written in the text of the Constitution. If we wish to preserve this right, it is my contention that *now* is the time to put parents' rights into black and white—that is, to adopt an explicit constitutional amendment.

If we wait until the threat fully matures, we will have waited too long.

The History of Parental Rights Protection

We should start with the question: why did the Founders neglect to include parental rights in the text of the Constitution or Bill of Rights?

We must remember that the whole concept of a legally enforceable bill of rights was an innovative concept that was newly conceived in the American Republic. James Madison once remarked that a bill of rights was but a "parchment barrier"—that is, a paper tiger. Madison had witnessed invasions of religious liberty even after Virginia adopted religious freedom in its 1776 Bill of Rights. At the time, the view was that religious liberty was truly achieved in 1786 when a Virginia statute made this guarantee effective. This is completely backwards under our current legal theories. Constitutional provisions are more powerful than statutes. But in the Founding era, because the British system had no written constitution, the idea of a law higher than a statute was still a relatively novel idea. It was not until the U.S. Constitution was adopted as the "highest law of the land" that it became possible to have a bill of rights that was understood as a robust protection of our liberty.

Moreover, it was unimaginable that a socialistic state which purported to care for children over and against fit and willing parents would ever result from the state and national governments being created in the wake of our separation from Britain. No one would ever envision a form of government that pitted fit parents against the state over the right to make decisions concerning their children.

Thus, it was some time before a constitutional clash occurred between parents and the government over the right to raise children. It happened in Oregon in the 1920s, when the anti-Catholic bigotry of the era manifested itself in a law which banned all private education and demanded that children must be educated only in government schools.

It was reminiscent of a law in the era of King James which imposed a fine on parents who sent their children to "papist" colleges on the continent—there being only Anglican colleges in Britain at the time.

But this was a free America—not the tyrannical era of the Tudor monarchs. And free America, instead of telling parents that their children must attend a particular denomination's schools, told them that they must present their children to the government for compulsory instruction.

The Supreme Court heard the case of *Pierce v. Society of Sisters* in 1925 and rendered an incredibly important decision that trumpeted this principle:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. 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.

While homeschoolers have both praised and relied upon this decision, we must recognize the basis on which the Supreme Court found parental rights to be a constitutionally protectable interest to be a bit thin. The legal principle used in *Pierce* was first announced in *Meyer v. Nebraska*. The Court announced that “those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men” were protected under the Due Process Clause. This historically grounded formula was eventually “refined” to protect the rights that are “implicit in the concept of ordered liberty.” (The first use of this phrase was in the 1937 Supreme Court decision in *Palko v. Connecticut*.)

If implicit rights are tied to history, then there is a solid basis for determining what was a recognized right at a particular point in time. But when the discovery of “implicit rights” is simply left up to the personal opinions of Supreme Court justices, this theory becomes a vehicle which can be used by justices to impose their personal political opinions on an entire nation.

It is from this very doctrine that the Court invented the right to abortion in *Roe v. Wade* and the right to practice homosexuality in *Lawrence v. Texas*. Because the theory of implicit rights lost any connection with common law history, the legal footing for parental rights now stands on the same dubious foundation as the right to abortion and homosexuality.

The Current Supreme Court and Parental Rights

In the most recent parental rights decision by the Supreme Court (*Troxel v. Granville*), Justice Scalia made it clear that he is a political supporter of the concept of parental rights. He believes that this right is an inalienable human right and was included within the Ninth Amendment's declaration of reserved rights. However, because parental rights are not explicitly stated in any constitutional language, Scalia voted to deny parental rights the status of an enforceable constitutional right.

Troxel v. Granville was a plurality decision with six separate opinions. None of these conflicting opinions commanded a clear majority. Two of the justices voting in favor of parental rights have now left the court. They have been replaced by John Roberts and Samuel Alito, who are reputed to share many of the legal views of Scalia. Whether Roberts and Alito think like Scalia remains to be seen. But it is beyond question that many young conservative legal scholars are trained to think just like Scalia on this point. His views are the mainstream among groups like the Federalist Society.

In short, Scalia believes that no right is protected unless it is expressly stated in the text of the Constitution. While most of us like this theory if it is used to reverse *Roe v. Wade*, we would be quite alarmed if parental rights were suddenly no longer a protected constitutional right.

The *Troxel* case dealt with the right of grandparents to demand visitation with their grandchildren over the objection of the children's parents. Only four justices joined the main opinion of the Court, which held that parental rights were “fundamental,” meriting the highest level of constitutional protection. (Two of these, Rehnquist and O'Connor, are the justices who have since left the Court.) Justice Thomas wrote an opinion concurring in this result and emphasizing the same basic legal test.

Justice Souter wrote a separate opinion saying that parents have rights, but not fundamental rights. This means he holds a low view of parental rights.

As we already noted, Justice Scalia said that parental rights were not protected because they are not explicitly in the Constitution.

Justice Stevens held that parents do not have the right to override state legislative decisions of this nature—which is consistent with Stevens' overall anti-tradition, anti-religious perspective.

Justice Kennedy believed that modern family life was too complicated to be run simply by parents and he advocated a “balanced” approach, which is consistent with Kennedy's general anti-traditional theories.

Accordingly, we have only three current Supreme Court justices (including Thomas) who sided with a strong view of parental rights in this most recent decision. And two of these are among the most liberal members of the Court—Stephen Breyer and Ruth Bader Ginsburg.

Even if Alito and Roberts are both strong advocates of parental rights, we should not rest our confidence for the future of this country on a current five-to-four Supreme Court majority.

The Threat from the Left

In 2002, I published a novel, *Forbid Them Not* (Broadman & Holman), with the premise that a thinly-disguised Hillary Clinton had been elected president. The first act of her new administration was to secure the ratification of the UN Convention on the Rights of the Child (UNCRC). I do not claim the gift of prophecy, but there is a looming possibility that I may be proven right.

If this treaty becomes binding on the United States, the government would have the power to intervene in a child's life “for the best interest of the child.” Currently, the government can intervene in this fashion only by going to court and proving that parents have been abusive or have neglected their children. (This standard also applies in divorce cases on the presumption that the family unit has been broken.) This means that whenever the UN-dominated social services system thought that your parental choices were not the best, the government would have the power to override your choices and protect your child from you. If this treaty becomes binding, all parents would have the same legal status as abusive parents, because the government would have the right to override every parental decision if it deemed the parent's choice contrary to the child's best interest.

Specifically, spanking would be banned under the express terms of the UNCRC. Moreover, children would be required to be taught in a religiously “tolerant manner”. (The American Bar Association, which supports the treaty, has already opined that teaching children that Jesus is

the only way to God violates the spirit and meaning of the UNCRC.) The ability to homeschool one's children would become not a right, but a UN-supervised activity that could be overturned if social services personnel believed that it would be "best" for your child to receive another form of education. These are not idle speculations, but the proven result of the UN's own interpretation of the treaty as they have reviewed other nations' compliance with the treaty's provisions.

Here's the difference: No other major nation in the world has a constitutional provision that makes a provision of a treaty automatically part of the "highest law of the land." This is the Constitution's Achilles heel. In every other nation, the UNCRC is a political liability—if ratified in America, it would be an enforceable and binding law.

Under existing Supreme Court precedent, a treaty cannot override an express provision of the U.S. Constitution. But a treaty can override a reserved right (*Missouri v. Holland*). And a treaty certainly can override either a state constitution or state statute. Parental rights are reserved (or implied) rights; they are not an express provision within the Constitution.

A ratified treaty would clearly threaten our longstanding constitutional recognition of the liberty to raise our children. Moreover, it would instantly override every legislative victory ever won for homeschooling.

A federal district court has already ruled, in two separate cases, that the UNCRC is binding on the United States under the doctrine of customary international law. The Supreme Court has also begun to use the UN Convention, not as binding authority, but as persuasive authority in interpreting the Constitution. For instance, in the recent case *Roper v. Simmons*, the Court enacted a new statute-like rule that no state may impose the death penalty on juveniles—based in part on the Court's reading of this UN Convention.

The left does not believe in parental rights and has the legal and political mechanisms in place to fully eradicate this liberty.

What Do We Do?

What we don't do is wait around for doomsday.

Listen to Winston Churchill once again: "Want of foresight, unwillingness to act when action would be simple and effective, lack of clear thinking, confusion of counsel until the emergency comes, until self-preservation strikes its jarring gong—these are the features which constitute the endless repetition of history."

We need to act now, by an express constitutional amendment, to preserve the right of parents to direct and control the upbringing and education of their children.

While state laws and state constitutions are good ideas, they are utterly insufficient on their own because a treaty overrides all forms of state law—no matter if the treaty is actually ratified, or forced upon the nation by the courts through the doctrine of customary international law.

The only solution that works is a United States constitutional amendment. This stops all threats including treaties. Nothing else works in *every* case.

No interest group in America has ever achieved something this big, at least not since the Eighteenth Amendment enacted prohibition. But God blesses outnumbered people who stand for what is right. As homeschoolers, we have seen His blessing, protection, and victories over political adversaries that were considered overwhelming.

We will not succeed with a tepid plan for a partial victory.

There is no group in America as well situated, as well trained, or as strongly committed to parental liberty as homeschoolers. And we have allies. We need to raise the banner, create a plan for victory, and secure our place in history as the generation that placed the God-given right of parents into the category of expressly protected rights in the U.S. Constitution.

This may take a number of years. But we cannot wait until it is too late to start. Members of Congress will tell us that they are not ready to respond to protect parental rights until the threat is more advanced. We must not believe them. The issue of homosexual marriage is well advanced and they still do nothing.

Parental rights will be an urgent matter in Washington not when the UN Convention agents are at your door, but when sufficient Americans are at the doors of Congress, demanding protection now.

The time to fight is now. HSLDA is drafting a constitutional amendment and circulating it to friendly lawyers and organizations for review and comment. Once the text is done, we will find sponsors in the House and Senate. Achieving sponsorship, passage, and ratification will take an unbelievable effort from all of us and all of our allies. But we must not rest until the amendment becomes law.

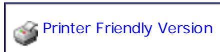
Do not think this will be easy. This is the fight of our generation. We will be falsely accused of wanting to protect child abuse. We will be falsely accused of meddling unnecessarily with the sacred Constitution. But we cannot be daunted by such duplicity.

God has given us our children and our citizenship. We must use our citizenship now to make sure that our children will have the same rights as we do to raise the next generation in the nurture and admonition of the Lord.

Will you stand up now, or will you wait until it is too late?

i *Winston S. Churchill: His Complete Speeches, 1897-1963*, ed. Robert Rhodes James (NY: Chelsea House Publishers, 1974), 6:5592.

For updates on the Parental Rights issue subscribe to the HSLDA Elert Service. Please send questions to info@parentalrights.org.



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