

Prepared Testimony of
Professor William Wagner
Before the
Michigan House of Representatives
Judiciary Committee
Jun 5, 2014

Mr. Chairman and Distinguished Members of the Committee: Thank you for the opportunity to provide testimony in support of House Concurrent Resolution 13, concerning a proposed amendment to the United States Constitution protecting families and their children.

INTRODUCTION

My name is William Wagner and I am a Tenured Professor of Law. I currently serve on the teaching faculty at a fully accredited national law school where I teach Constitutional Law. Before joining academia, I served as a federal judge in the United States Courts, a Senior Assistant United States Attorney in the Department of Justice, and as a Legal Counsel in the United States Senate.

I was asked to testify today and provide my opinion as to whether an Amendment to the United States Constitution is needed to protect the fundamental liberty of parents to direct and control the upbringing of their children. For the following reasons, it is my opinion that it is.

THE NECESSITY OF THE PARENTAL RIGHTS AMENDMENT
TO THE UNITED STATES CONSTITUTION

The Parental Rights Amendment (PRA) codifies and preserves the *longstanding traditional standard* for parental rights and child protection in America.

The Fundamental Liberty of Parents
to Direct and Control the Upbringing of Their Children

Both Michigan law¹ and the Supreme Court of the United States² hold that parental rights, especially concerning education, are “fundamental” rights as called for in PRA Sections One and Two.

¹ *People v. DeJonge*, 501 N.W.2d 127, 442 Mich. 266 (Mich. 1993) involved a parent’s choice, (grounded in a sincerely held religious conviction) to school their children without a certified teacher. In *DeJonge* the court applied strict scrutiny to the government action as applied to families whose religious convictions prohibit them from using certified instructors:

In sum we conclude that the historical underpinnings of the First Amendment of the United States Constitution and the case law in support of it compels the conclusion that the imposition of the certification requirement upon the DeJonges violates the Free Exercise Clause. We so conclude because we find that the certification requirement is not essential to nor is it the least restrictive means of achieving the state's claimed interest. Thus, we reaffirm "that sphere of inviolable conscience and belief which is the mark of a free people." *Weisman*, 505 U.S. at ----, 112 S.Ct. at 2658, 120 L.Ed.2d at 484. We hold that the teacher certification requirement is an unconstitutional violation of the Free Exercise Clause of the First Amendment as applied to families whose religious convictions prohibit the use of certified instructors. Such families, therefore, are exempt from the dictates of the teacher certification requirement. (442 Mich. At 298-99)

However, in *People v. Bennett*, 501 N.W.2d 106, 442 Mich. 316 (Mich. 1993), the court held in a case involving a compulsory attendance law (not involving religious conscience), that parents do not have a fundamental right to control the upbringing of their children in contexts outside of exercising their Freedom of Religious conscience:

We conclude that the Fourteenth Amendment does not provide parents a fundamental right to direct their children's secular education, and, thus, the state regulation need only be judged by a rational relationship test. We further conclude that the defendants have not met the burden of establishing that teacher certification is not reasonably related to the state's legitimate interest.

In response to the *Bennett* decision the Michigan legislature passed, and governor signed, MCL 380.10 (Rights of parents and legal guardians; duties of public schools). Sec. 10 of this act expressly provided that parents *do have a fundamental right* to direct and control the upbringing of their children, whether or not the exercise of that right is grounded in the free exercise of religious conscience:

The U.S. Supreme Court’s initial recognition of parental rights occurred in the 1923 case of *Meyer v. State of Nebraska*.³ The State of Nebraska enacted a statute mandating that: “No person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any language other than the English language.”⁴ Under the statute, the government prosecuted and convicted a person who taught “the subject of reading in the German language” to a 10 year old child.⁵ The Court held the government action unconstitutional and specifically recognized that the liberty interests provided for in the Constitution include a parent’s fundamental right to direct the upbringing of their children.⁶ The Court went on to recognize that “[c]orresponding to the right of control it is the natural duty of the parent to give his children education suitable to their station in life.”⁷ According to the Court, proper exercise of a government’s police power must respect fundamental rights like these; the *Meyer* Court concluded, therefore, that legislative enactments interfering with a fundamental right were subject to judicial review.

Meyer cautioned that state control of a child’s upbringing historically fit within authoritarian dictatorial governing cultures. The Court then observed that such measures

It is the natural, fundamental right of parents and legal guardians to determine and direct the care, teaching, and education of their children. The public schools of this state serve the needs of the pupils by cooperating with the pupil's parents and legal guardians to develop the pupil's intellectual capabilities and vocational skills in a safe and positive environment.

Thus, Michigan law clearly holds that parents have a fundamental right to direct and control the upbringing of their children. Consequently, in Michigan, strict scrutiny analysis applies to government actions and laws that substantially interfere with this fundamental liberty.

² *Meyer v Nebraska* 262 US 390 (1923); *Pierce v Society of Sisters* 268 US 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972)

³ *Meyer v Nebraska* 262 US 390 (1923)

⁴ *Id.* at 397

⁵ *Id.* at 396-397

⁶ *Id.* at 399-400

“were wholly different from those upon which [American] institutions rest;” imposing such state restrictions upon the citizenry could not be done “without doing violence to both letter and spirit of the Constitution”.⁸

Two years later, in *Pierce v Society of Sisters*, the Court reaffirmed parental rights as a constitutionally protected liberty interest.⁹ The Court stated: “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.”¹⁰ In *Pierce*, the State government of Oregon enacted a law mandating that parents send their children to government schools. In striking down the law as unconstitutional, the Court treated the parents’ fundamental liberty interest as a limit on government action.

Likewise, in *Wisconsin v. Yoder*, the Court held that “[t]his primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.” The court reversed convictions of parents prosecuted under a compulsory school attendance law. As a basis for its decision, the Court relied upon the parents’ fundamental right to direct the upbringing of their children, and their right to the free exercise of religion.¹¹

⁷ *Id.* at 400; According to the Court, proper exercise of a government’s police power must respect fundamental rights like these; the Court concluded, therefore, that legislative enactments interfering with a fundamental right were subject to judicial review. *Meyer v Nebraska* 262 US 390 at 400-401 (1923)

⁸ *Id.* at 399-400

⁹ *Pierce v Society of Sisters* 268 US 510 (1925)

¹⁰ *Id.*

¹¹ *Wisconsin v. Yoder*, 406 U.S. 205 (1972). *Yoder* analyzed the matter before the Court both as a matter involving the free exercise of religious conscience, and as a matter implicating the fundamental liberty interest of parents to direct the upbringing of their children. Judges and scholars dispute whether these are separate analyses or a hybrid. If the latter, then less protection for the parental right exists in absence of some additional complimenting fundamental right like those protected under the First Amendment.

The Proper Level of Judicial Scrutiny
for Government Actions Infringing upon Parental Liberty

Under United States Supreme Court precedent, a Court applies *strict scrutiny* when reviewing government actions that substantially interfere with a citizen's fundamental rights. The language of PRA Section Three comes directly from U.S. Supreme Court case law articulating this "strict scrutiny" standard.

"The essence of all that has been said or written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of [a fundamental right]." – *Wisconsin v. Yoder*, 406 U.S. 205 (1972); See also *Adarand v. Peña*, (1995), *Widmar v. Vincent*, (1982), and *Church of the Lukumi Babalu Aye, Inc., v. Hialeah*, (1993).

Courts at various levels of the federal judiciary used this same terminology in 125 cases since its introduction in 1972. Its meaning, therefore, is well established and clear.

Protecting Children and Preserving Parental Rights

Using the same fundamental right standard in the federal PRA, as currently exists in Michigan law, preserves Michigan's compelling government interest in passing laws protecting children from abuse by unfit parents. Indeed, state laws that provide for child safety and protection are upheld under a strict scrutiny standard because the government has a compelling interest in protecting children where unfit parents threaten their welfare. For example, Michigan has a compelling interest in protecting children against the physical abuse of a child committed by an unfit parent. Section Four of the PRA

specifically provides that the PRA’s protections for parents do not apply to parental actions that end a child’s life.

The fundamental rights standard in the PRA also preserves a fit parent’s fundamental liberty to control and direct the upbringing of their children. In *Troxel v. Granville*, a majority of the United States Supreme Court failed, for the first time in contemporary history, to apply the strict scrutiny standard.¹² The *Troxel* decision therefore created ambiguity and confusion in lower courts. Indeed, an increasing number of federal courts interpret *Troxel* as granting them greater latitude on whether to even apply strict scrutiny to government actions that substantially interfere with parental decisions concerning their children. This shift in the Supreme Court’s commitment to protecting children and constitutional rights of parents urgently necessitates passage of the PRA.

¹² Justice Thomas’ concurring opinion accurately notes:

“.... The opinions of [a majority of the Court] recognize [a fundamental parental] right, but curiously none of them articulates the appropriate standard of review....” – *Troxel v. Granville*, 530 U.S. 57 (2000), Thomas concurring at 530 U.S. 80.

Preserving State Sovereignty

Section Five of the proposed Amendment is designed to preserve the authority of the State of Michigan over matters reserved to them under the Tenth Amendment, which might otherwise be ceded to the federal government through a properly executed treaty. The United Nations' Convention on the Rights of the Child is an example of a treaty that, if ratified, overrides laws enacted by the Michigan legislature relating to families and children. In this regard, Article VI of the United States Constitution expressly provides that:

"... all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."(emphasis added)

Moreover, in *Reid v. Covert*, 354 U.S. 1 (1957), the U.S. Supreme Court confirmed that:

"To the extent that the United States can validly make treaties, the people and the States have delegated their power to the National Government and the Tenth Amendment is no barrier."

Conclusion

For all the above reasons, I urge you to pass House Concurrent Resolution 13 in support of the proposed Parental Rights Amendment to the U.S. Constitution. The proposed amendment preserves the longstanding traditional standard of parental rights protection already recognized in the State of Michigan, and preserves for the State the same legal authority that it already has to govern in areas of child safety and abuse prevention.