

The Confused Character of Parental Rights in
the aftermath of *Troxel*

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The historic theory of parental rights

John Locke, *Second Treatise of Civil Government* (1690)

Excerpts from Ch. 6, "Of Paternal Power"

Locke contended that properly speaking the power to direct the education and upbringing of children belonged to "parents"—not just to fathers.

It may perhaps be censured as an impertinent criticism, in a discourse of this nature, to find fault with words and names, that have obtained in the world: and yet possibly it may not be amiss to offer new ones, when the old are apt to lead men into mistakes, as this of paternal power probably has done, which seems so to place the power of parents over their children wholly in the father, as if the mother had no share in it; whereas, if we consult reason or revelation, we shall find, she hath an equal title. This may give one reason to ask, whether this might not be more properly called parental power? for whatever obligation nature and the right of generation lays on children, it must certainly bind them equal to both the concurrent causes of it. And accordingly we see the positive law of God every where joins them together, without distinction, when it commands the obedience of children, Honour thy father and thy mother, Exod. xx. 12. Whosoever curseth his father or his mother, Lev. xx. 9. Ye shall fear every man his mother and his father, Lev. xix. 3. Children, obey your parents, &c. Eph. vi. 1. is the stile of the Old and New Testament.

Locke taught that the law of nature, written by God on the hearts of all men, required parents to provide for the needs of their children.

Adam was created a perfect man, his body and mind in full possession of their strength and reason, and so was capable, from the first instant of his being to provide for his own support and preservation, and govern his actions according to the dictates of the law of reason which God had implanted in him. From him the world is peopled with his descendants, who are all born infants, weak and helpless, without knowledge or understanding: but to supply the defects of this imperfect state, till the improvement of growth and age hath removed them, Adam and Eve, and after them all parents were, by the law of

nature, under an obligation to preserve, nourish, and educate the children they had begotten; not as their own workmanship, but the workmanship of their own maker, the Almighty, to whom they were to be accountable for them.

Locke taught that this parental power was not absolute, but rather a trust from God, to be performed for the good of the child and was subject to limitations. Specifically, the father could not take the life of the child; nor could he dispose of the property of the child.

This is that which puts the authority into the parents' hands to govern the minority of their children. God hath made it their business to employ this care on their offspring, and hath placed in them suitable inclinations of tenderness and concern to temper this power, to apply it, as his wisdom designed it, to the children's good, as long as they should need to be under it.

But what reason can hence advance this care of the parents due to their off-spring into an absolute arbitrary dominion of the father, whose power reaches no farther, than by such a discipline, as he finds most effectual, to give such strength and health to their bodies, such vigour and rectitude to their minds, as may best fit his children to be most useful to themselves and others; and, if it be necessary to his condition, to make them work, when they are able, for their own subsistence. But in this power the mother too has her share with the father.

The worldview of Locke was shared, at least in its essential components, by the United States Supreme Court in 1925 when in the case of *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), it declared as unconstitutional a law of Oregon that demanded that every child in the state attend the public schools operated by its government.

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.

268 U.S. at 535.

This decision was delivered on June 1, 1925 and was a material part of the whole theory of substantive due process. The idea was that the

Due Process Clause protected more than mere procedural rights in the judicial system. There were substantive protections for liberty that even the votes of legislative majorities could not override. It is generally remembered by legal scholars and practitioners that this theory was used to invalidate many of the early legislative initiatives of the New Deal. Economic liberties were also included in the “fundamental theory of liberty upon which all governments in this Union repose.” This application of the doctrine to economic liberty was, of course, repudiated, marking a triumph of FDR and the Congress over the Court.

Many of the current critics of substantive due process seem to forget that it was the basis for the theory that the Due Process Clause of the 14th Amendment incorporated selected portions of the federal Bill of Rights making them applicable to the States. It was just seven days after the decision in *Pierce* that the Court declared in *Gitlow v. People of New York*, 268 U.S. 652, 666 (1925):

For present purposes, we may and do assume that freedom of speech and of the press which are protected by the First Amendment from abridgment by Congress are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States.

Parental rights led the way. The incorporation of the freedoms of speech and press followed immediately in the same wake.

Despite the commonality of their origin in Supreme Court theory, parental liberties and the twin liberties of speech and press have not stayed on parallel courses. Today, there is no basis for doubt in any court in this country for the proper legal standards to employ in cases involving freedom of speech or press—at least in the general sense. These freedoms are fundamental rights. Any intrusion by a government into a fundamental right demands strict judicial scrutiny with all presumptions being given in favor of the exercise of these rights. These rights may only be overridden by government if there is proof that such a course of action is essential to further a compelling governmental interest and that the restriction has been drawn employing the least restrictive means available to accomplish the purpose.

A review of current litigation in the field of parental rights cannot be restated in a similar manner. Broad, confident statements are difficult to make with accuracy. There are many restrictions, exclusions, modifications, and limitations employed by the courts when discussing parental rights.

Let's review a sample of current judicial descriptions of the nature of the constitutional rights of parents.

The Federal District Court for the Eastern District of Missouri said in 2008:

The Eighth Circuit Court of Appeals has recognized that parents have an important, but limited substantive due process right in the care and custody of their children.

Anderson v. Waddle, WL 4561467, 4 -5 (E.D.Mo. 2008)

Or, this statement by the Federal District Court for the Western District of Virginia in 2008:

Furthermore, the precise confines of the right to familial privacy are nebulous. *See Hodge v. Jones*, 31 F.3d 157, 164 (4th Cir.1994) (“There is little, if any, clear guidance in the relevant caselaw that would permit us to chart with certainty the amorphous boundaries between the Scylla of familial privacy and the Charybdis of legitimate government interests.”).

Proctor v. Green, 2008 WL 2074069, 4 (W.D.Va. 2008).

There is little doubt that much of this confusion stems from the splintered decision issue by the Supreme Court in *Troxel v. Granville*, 530 U.S. 57 (2000).

Lower courts have been quick to note the fact that the Supreme Court has left the subject of parental rights in disarray. I will share just one example for now from what was, by all reasonable means of reckoning, the most highly publicized parental rights decision of 2008.

In February of last year, the world of homeschooling was rocked with the news that one panel from the California Court of Appeal had determined that homeschooling was not permitted in that state for any parent save those possessing the teaching credential which would also allow them to teach in the public schools. The national media made much of the story in the broadcast media, traditional print journalism, and of course, the internet sources went absolutely mad.

Two lawyers who are in this room today, I being one of them, were the de facto authors of the motion to reconsider that decision. To our great astonishment, the court granted the motion. And to my even greater astonishment—perhaps profound shock would be a better description—the court completely reversed itself in July. The court held

that California law, despite its earlier effort at statutory construction, did indeed permit homeschooling for ordinary parents. Moreover, despite their declaration that parents had no constitutional rights to the contrary, the court embraced the notion that parental rights were a fundamental liberty and applied strict scrutiny to reach the conclusion—that very closely tracked my oral argument before that court—that the state did have a compelling interest in following its dependency laws by allowing juvenile courts the power to review homeschooling decisions by parents whose children had previously been found to be dependent for reasons wholly unrelated to their education at home.

However, the new constitutional analysis that was employed by this court was based on California decisions, not the decisions of the United States Supreme Court. Here is what was said about the High Court's jurisprudence on parental rights:

Early U.S. Supreme Court cases established that parents possess a liberty interest, protected by the due process clause, in directing the education of their children. (*Prince v. Massachusetts* (1944) 321 U.S. 158, 166, 64 S.Ct. 438, 88 L.Ed. 645; *Pierce v. Society of Sisters* (1925) 268 U.S. 510, 534-535, 45 S.Ct. 571, 69 L.Ed. 1070; *Meyer v. Nebraska* (1923) 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042.) In those cases, however, the right was not protected by strict scrutiny, and restrictions on the right were upheld if they satisfied rational relation review. (*Prince v. Massachusetts, supra*, 321 U.S. at pp. 168-170, 64 S.Ct. 438; *Pierce v. Society of Sisters, supra*, 268 U.S. at pp. 535-536, 45 S.Ct. 571; *Meyer v. Nebraska, supra*, 262 U.S. at pp. 399-400, 43 S.Ct. 625.)

However, more recent authority discussing the interest has not set forth the standard of scrutiny. (See *Troxel v. Granville* (2000) 530 U.S. 57, 80, 120 S.Ct. 2054, 147 L.Ed.2d 49, (conc. opn. of Thomas, J. [suggesting that he would apply strict scrutiny to protect this right]).)

We now turn to *Troxel* itself to analyze each of the Court's six separate opinions—none of which managed to get five votes.

Troxel involved a constitutional challenge to a visitation statute. Similar state laws are often called grandparent visitation statutes. And indeed, that was the attempted application of the statute in this very case. But in the Washington case any person could bring an action claiming the right to visit a child on the ground that it was in the best interest of the child.

The Supreme Court of Washington was very clear in its reading of the United States Supreme Court precedent. Case law required the conclusion that absent a proof of harm to a child, a fit parent's decision about allowing third-parties to visit with their children was not to be overridden by the state.

The court said:

For the state to delegate to the parents the authority to raise the child as the parents see fit, except when the state thinks another choice would be better, is to give the parents no authority at all. 'You may do whatever you choose, so long as it is what I would choose also' does not constitute a delegation of authority.

137 Wash. 2d. 1.

However, the Supreme Court of the United States did not read its own precedent in the same manner. Rather than seeing bright lines, clear tests, and judicial certainty, the plurality decision resorted to a case-by-case standard that is inherently as ambiguous as is it unhelpful to lower courts and litigators.

Justice O'Connor delivered the plurality opinion which was joined by Chief Justice Rehnquist, and Justices Ginsburg and Breyer. Indeed, the Court recites much of the same rhetoric about the importance of parental rights which had led the Supreme Court of Washington to reach a clear and bold decision. However, rather than applying these cases with the same judicial tests and rigor employed in free speech and press matters, the Court put the matter on a different footing:

Because we rest our decision on the sweeping breadth of §26.10.160(3) and the application of that broad, unlimited power in this case, we do not consider the primary constitutional question passed on by the Washington Supreme Court—whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation. We do not, and need not, define today the precise scope of the parental due process right in the visitation context. In this respect, we agree with Justice Kennedy that the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied and that the constitutional protections in this area are best “elaborated with care.”

530 U.S. at 73.

Justice Souter concurs saying: “Our cases, it is true, have not set out exact metes and bounds to the protected interest of a parent in the relationship with his child.” *Id.* at 78. Rather than declaring parental direction of a child to be a fundamental right, Souter says that such rights are “generally protected.” *Id.* at 77.

Justice Thomas’ opinion presents a bit of a conundrum, even for his friends. Thomas opens his very short concurrence with the observation that no party has challenged either of two key propositions: (1) that parental rights are a fundamental right under *Pierce* and its progeny; and (2) that unenumerated rights deserve judicial protection. Accordingly, he “expresses no view” on these matters with the understanding that the plurality also leaves the questions for another day.

He then goes on to say that, since these principles are not challenged, he would follow current precedent to actually employ strict judicial scrutiny with the compelling interest test as is required for any recognized fundamental right.

Thomas is the only member of the Court to employ that formula, but even his use is marked by an asterisk and subject to review in a future, properly-briefed case.

Justice Stevens dissents arguing that a child’s constitutional rights—represented by the mantra “the best interest of the child”—may indeed be overridden by the government without the necessity of the government proving that the parent had harmed the child in the first place. Stevens would allow the matter to be finally determined by the Court’s according to its view of the child’s best interest, so long as it somehow employed a general presumption that the parent acted in the child’s best interest—an application that appears to be more of a thin factual presumption rather than a robust legal barrier.

Stevens’ view, of course, is entirely consonant with the governing philosophy of the UN Convention on the Rights of the Child.

Scalia was vintage Scalia, finding a pathway all his own. Finding no reliance by parents on the rights found in the *Pierce* line of cases, Scalia opines that parental rights are simply unenforceable because they are unenumerated. He equates the substantive due process basis for parental rights with the substantive due process cases, which embraced economic liberty which, as he noted, had been long repudiated.

I know our next speaker will likely point out other reasons Scalia might have been inclined to reach this view that are driven by his opposition to cases like *Roe v. Wade* and *Lawrence v. Texas*—a position I share with Scalia.

However, unlike Scalia, I believe that there are unenumerated constitutional rights that the courts may protect, and that is exactly what the Ninth Amendment says and means. For me, the test is the original meaning of the terms in the relevant text as demonstrated by history. However, I will readily admit that no decision of the Supreme Court has ever undertaken the historical analysis of the 14th Amendment to demonstrate the view that it has followed on parental rights. It is my view that the relevant history would produce a clear result in favor of parental rights—but that is beyond the scope of my topic for today.

Kennedy also dissents, describing parental rights in language that illumines nothing and protects no one:

The principle exists, then, in broad formulation; yet courts must use considerable restraint, including careful adherence to the incremental instruction given by the precise facts of particular cases, as they seek to give further and more precise definition to the right.

Id. at 95-96.

Kennedy pointedly avoids labeling parental rights as “fundamental.”

To illustrate the confusion that currently prevails in parental rights cases, I have undertaken a review of every reported state and federal decision on this topic decided in the calendar year 2008.

While a case or two may have evaded my method of detection, the fifteen cases I have identified for analysis are sufficient to demonstrate my main point—that the legal standards to be employed in parental rights cases are in fairly substantial confusion. I was an active participant in two of these cases, as lead counsel in one, and as counsel for amici in the other—even though in that case the court allowed me along with other select amici to participate in oral argument.

It is interesting to note that parental rights received far more favorable treatment in state appellate courts during 2008, than from the federal courts.

State Cases

1. The most robust declaration in favor of parental rights came from the Supreme Court of Indiana in *Willis v. State*, 888 N.E.2d 177 (Ind. 2008). In that case the Court reversed a criminal conviction of a single mother who had given her 12 year-old son a pants-down spanking with a belt. Bruises were found after the spanking, but the boy did not require medical treatment. He had been caught stealing his mother's clothing and lying about it when caught at school, and lying again to his mother.

The court had no difficulty finding that the parental right involved was fundamental and requiring the application of the compelling interest test. While noting that true abuse was not protected, it found no abuse in the spanking administered by this mother.

2. The Supreme Court of Nebraska issued an intriguing decision in *Amanda C. ex rel. Richmond v. Case*, 275 Neb. 757, 749 N.W.2d 429 Neb. 2008) declaring that children have a reciprocal right flowing from the right of parents to direct the upbringing of their children. This means that the child has a right to receive parental direction and control without interference from the state.

Amanda had lost the right to her relationship with her father after a social worker had employed deception upon both the father and the court system by promising that Amanda was being adopted in an "open adoption" where her father would continue to exercise rights of visitation.

3. The highest court of Maryland refused to order a mother to allow her former female domestic companion to exercise visitation rights over her children. In so doing, the court rejected the theory of de facto parenting with concomitant parental rights. *Janice M. v. Margaret K.*, 404 Md. 661, 948 A.2d 73 (Md. 2008)

Concerning *Troxel*, the Maryland court said:

The plurality declined to define the precise scope of the parental due process right in the visitation context and declined to answer the question of whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm.

404 Md. At 675.

4. The Kansas Supreme Court refused to allow an unwed father to re-open an adoption of a child he had fathered. *In re Adoption of A.A.T.*, 196

P.3d 1180 (Kan. 2008). The child's birth mother had lied to the baby's father with repeated claims that she had aborted the child. She filed false affidavits with the court claiming she had no knowledge of the father's whereabouts. And the father acted with dispatch in seeking relief when learning the truth.

Even though the court held that parental rights were fundamental in nature, the Kansas court followed the U.S. Supreme Court line of cases on unwed fathers who could relinquish their parental rights by failing to take any meaningful steps to establish a relationship with their child. The court did acknowledge that no U.S. Supreme Court case had faced a fact pattern where the father's only failure was to follow up on a suspicion that the baby's mother was lying about an abortion.

5. The Supreme Court of Connecticut cited *Troxel* for the proposition that parental rights are "fundamental" in *Dutkiewicz v. Dutkiewicz*, 289 Conn. 362, 957 A.2d 821 (Conn. 2008). While implicitly treating the *Troxel* plurality as a binding majority decision, the court also noted that it continued to rely on a statement from Justice Kennedy's dissent that these matters need to be decided on a case-by-case basis.

This decision is noteworthy for its careful analysis that parental rights vis-à-vis the state are implicated whenever the government attempts to interfere with parental decision-making. The court held that requiring a father in a divorce proceeding to attend parenting classes did not interfere with his ability to make whatever decisions he wanted for his children.

6. An intermediate New York appellate court decision contains a brief discussion of parental rights in a decision declaring a juvenile curfew to be unconstitutional. *Jiovon Anonymous ex rel. Thomas Anonymous v. City of Rochester*, 56 A.D.3d 139, 865 N.Y.S.2d 804 (N.Y.A.D. 4 Dept. 2008). This use of parental rights amounts to judicial piling-on since it had already invalidated the ordinance on numerous other grounds. It opined that this "fundamental right" will not permit "undue governmental interference." 56. A.D. at 150. This is a far cry from strict judicial scrutiny.

7. The Maine Supreme Court dismissed yet another grandparent visitation effort. *Davis v. Anderson*, 953 A.2d 1166 (Me. 2008). Citing their own cases, the Maine court held that interfering with parental liberty in this area implicates a fundamental right which demands strict judicial scrutiny. The court said that the only compelling interest that currently is justified by Maine precedent is where a grandparent demonstrates that he is in fact the child's de facto parent.

8. The Washington Supreme Court cited its own version of the *Troxel* decision in a bizarre case involving a very young child who drowned while being watched by her step-father. The issue was whether a step-parent should be clothed with the same immunity for liability for a child's injuries stemming from ordinary negligence. The court noted the perplexing fact that this step-father had purchased a \$200,000 accidental death life insurance policy on this little girl just months earlier. But, the ultimate holding was that the court extended parental immunity to step-parents only if they showed an actual parenting relationship with the child. They remanded the case to the lower court to determine if such a relationship existed here with loud hints that the appellate court didn't believe that the facts would support such a conclusion.

9. We have previously discussed the decision of the California Court of Appeal in the highly publicized case involving homeschooling. The court declared parental rights to be fundamental and analyzed the case employing the compelling interest test. *Jonathan L. v. Superior Court*, 165 Cal.App.4th 1074, 81 Cal.Rptr.3d 571 (Cal.App. 2 Dist. 2008).

Federal Cases

10. In another homeschooling case, the Third Circuit upheld a constitutional challenge to the Pennsylvania homeschooling law. *Combs v. Homer-Center School Dist.* 540 F.3d 231 (3rd Cir. 2008). In a case that I argued as lead counsel, several Pennsylvania families claimed that the state's homeschooling law unconstitutionally subjected their exercise of a fundamental right to the subjective review of local public school superintendents. The case was principally focused as a religious liberty case, but parental rights were a key component of the matter because of the argument that parental rights can serve as a "hybrid right" to justify the application of the compelling interest test as indicated in *Employment Division v. Smith*, 494 U.S. 872 (1990).

The Third Circuit held that the hybrid theory of *Smith* was non-binding dicta and refused to apply it. Moreover, the court held that in any event the parent's right to avoid the official discretion of a public school official who could decide whether or not to terminate homeschooling on purely subjective grounds did not implicate a fundamental liberty interest. Instead, the court applied a rational basis test and upheld the prerogatives of the school officials in Pennsylvania to disapprove of homeschooling programs in their district.

11. The 11th Circuit issued an opinion in a public school flag salute case which could be appropriately labeled by parental rights advocates as a “with friends like these who needs enemies” approach. *Frazier ex rel. Frazier v. Winn*, 535 F.3d 1279 (11th Cir. 2008)

Apparently having little else to do, civil liberties lawyers filed a challenge to a 1942 Florida statute that required children to salute the flag unless the parent had given the child permission to opt out of the exercise. The 2008 decision of the 11th Circuit held that the protection of parental rights justified the constitutionality of this statute. A 2009 dissent was filed from the refusal to rehear the matter en banc. A Supreme Court cert petition would seem likely to follow.

The court would have had the easy path of dismissing the case for lack of a ripe controversy because the child’s parent in the case fully agreed with the view of the child to opt out of the flag salute. Rather, it weighed the child’s rights to religious freedom against the parental rights of control of the education and upbringing of their children.

This decision could result in an unfortunate backlash with the result of the launching of a robust parent vs. child clash of constitutional rights.

12. The United States District Court for the Northern District of Oklahoma issued a shocking decision in a civil rights case brought by a parent who had been a leader in the corps of parental volunteers at an elementary school. *Mayberry v. Independent School Dist. No. 1 of Tulsa County, Okla.* WL 5070703, 4-5 (N.D.Okla. 2008).

The parent in question “checked on” a little girl in a classroom at the express request of the girl’s mother. At the end of her conversation with the girl, the parent volunteer gave the child a short hug. The administration banned the mother from the school for six months without meaningful explanation of the reasons. In the “hearing” which followed before the school board the parent was not allowed to cross-examine witnesses nor even find out about testimony received by the board in executive session.

Completely ignoring the equal protection claim brought by the mother, the federal district court simply held that parents have no right to be on public school property where their children are in attendance.

13. In a civil rights claim brought against social workers for highly improper tactics against a Christian boarding school, the federal district court for the Western District of Missouri refused to grant qualified

immunity to the chief defendants. *Anderson v. Waddle*, WL 4561467, 4 - 5 (E.D.Mo. 2008).

The parents claimed that their right to place their children in this school had been violated by the forcible removal of their children from the school, and the retention by the government of the children in foster care for a short period.

Although the ultimate holding of the court favored the plaintiff-parents, the discussion of the constitutional principles to be employed in parental rights cases fall far short of anything resembling a fundamental rights analysis.

The Eighth Circuit Court of Appeals has recognized that parents have an important, but limited substantive due process right in the care and custody of their children. *Manzano v. South Dakota Dept. of Soc. Servs.*, 60 F.3d 505, 509-10 (8th Cir.1995). Liberty interests of parents include the custody, care, and management of their children. *King v. Olmsted County*, 117 F.3d 1065, 1067 (8th Cir.1997).

The net result of these competing interests is that we must weigh the interests of the state and child against those of the parents to determine whether a constitutional violation has occurred. Under this balancing test, the officials' actions must have been based on a reasonable suspicion of abuse and must not have been disproportionate under the circumstances. *Id.* at 1371-72 (“The difficulty in the present case is not whether such a reasonable suspicion can be found, but rather, whether the actions taken by the defendants and the resulting disruption to plaintiffs' familial relations with [the child] were so disproportionate under the circumstances as to rise to the level of a constitutional deprivation.”).

By employing the “reasonable suspicion” standard, the court created a standard which grants constitutional immunity to social workers who have forcibly removed children even though they lacked the level of evidence that would be necessary to conduct even the most minimal lawful search (probable cause.) So much for strict judicial review.

14. The Northern District of Indiana issued a favorable parental rights ruling in a case where a third party social services organization announced psychological disorders in high school students after administering a written analytical exam. However, this decision is most

noteworthy for its candid discussion of the murkiness of the whole field of substantive due process in general and parental rights in particular.

Concerning substantive due process the court said: “Such cases become muddled in a less rigid and more fluid inquiry than envisaged in other specific and particular provisions of the Bill of Rights.” And on the subject of parental rights the court specifically rejected the approach of the Ninth Circuit in *Fields v. Palmdale School District*, 427 F.3d 1197 (9th Cir. 2007), where that court held that parents have no rights over their children once they drop them at the front door of the public school. However, this court stopped short of using the traditional fundamental rights criteria and simply made a decision on the facts before it.

15. The Western District of Virginia dismissed a civil rights claim by a father who had been falsely accused by a social worker of sexually molesting his daughter. *Proctor v. Green*, 2008 WL 2074069, 5 (W.D.Va. 2008). The court held that “the precise confines of the right to familiar privacy are nebulous” and that “there is little, if any, guidance from the relevant case law that would permit us to chart with certainty the amorphous boundaries between the Scylla of familial privacy and the Charybdis of legitimate government interests.”

Conclusion

The need for clear constitutional standards for parental rights is evident—particularly in the federal courts.