FINAL BILL ANALYSIS

BILL #: HM 557

FINAL HOUSE FLOOR ACTION:
Passed on Voice Vote

SPONSOR: Rep. Coley

GOVERNOR'S ACTION:
N/A

COMPANION BILLS: SM 954

SUMMARY ANALYSIS

HM 557 passed the House on April 26, 2011, and subsequently passed the Senate on May 5, 2011. This memorial urges the United States Congress to propose and submit to the states for ratification an amendment to the Constitution enumerating a fundamental parental right.

There are certain rights that are "fundamental" to every American citizen. In the broadest view, those fundamental rights are enumerated in the first ten amendments to the United States Constitution (Constitution) called the Bill of Rights. The United States Supreme Court has found that fundamental rights are not limited to those specifically enumerated in the Constitution. There are other, non-enumerated, fundamental rights as well.

The non-enumerated right of parents to direct the upbringing and education of their children has long been recognized by the United States Supreme Court as a fundamental right. There is concern among some parental rights advocates that a weakening in the fundamental right of parents to raise their children is taking place.

The House Memorial does not amend, create, or repeal any provisions of the Florida Statutes.

The House Memorial has no fiscal impact on state or local government.

I. SUBSTANTIVE INFORMATION

Background

Before the United States Constitution was written, the Declaration of Independence, dated July 4, 1776, acknowledged the following truths as being self-evident concerning the Creator as being the source of fundamental rights, the purpose of governments to protect those rights, and sovereignty of the people over the governments they establish:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among men deriving their just powers from the consent of the governed,

Some fundamental rights are expressly enumerated in the Bill of Rights and the remaining 17 Amendments to the U.S. Constitution. Enumerated fundamental rights including the freedom of speech (1st Amendment), freedom of religion (1st Amendment), the right to vote (Article I and Amendments 14, 15, 17 and 19), and equal protection under the law (14th Amendment) are easily discernible through the reading of the text of the U.S. Constitution. However, there are fundamental rights that are not enumerated which have been found to exist through the interpretation of the U.S. Constitution by the Supreme Court of the United States.

Parental Rights as a Protected Liberty Interest

In 1923, in the case of *Meyer v. Nebraska*, the United States Supreme Court held that 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."[1] Later, in *Wisconsin v. Yoder*, the United States Supreme Court recognized that the fundamental nature of the right of parents in the upbringing of children was firmly established almost as if rooted in history and tradition. The Court stated:

> . . . this case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. 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.[2]

The Court recognized the state's role as parens patriae ("parent of his or her country") to save children from abusive or unfit parents, but recognized that the state interest must be balanced with an understanding that, absent such abuse or danger, parents do traditionally retain certain fundamental rights to direct the upbringing of their children.

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[1] *Meyer v. Nebraska*, 262 U. S. 390, 399, 401 (1923). See also, *Pierce v. Society of the Sisters*, 268 U.S. 510 (1925).
[2] *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

In *Troxel v. Granville*, the Court acknowledged *Meyer* and other precedent recognizing parental rights as a fundamental liberty interest protected by the Due Process Clause of the Fourteenth Amendment.[3]

The Court stated: "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."[4]

> . . . ("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 Meye*r and *Pierce*)). In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.[5]

The Court also recognized a cardinal tenant that the parents' function and freedom "include preparation for obligations the state can neither supply nor hinder."[6] The *Troxel* Court also noted that as long as a parent is fit and sufficiently cares for his or her children, the state will have no reason to inject itself into the private realm, nor shall it further question a parent's ability to make decisions in the best interest of the child.[7]

In rendering his dissent, Justice Scalia noted the variety of opinion among the Justices:

> The sheer diversity of today's opinions persuades me that the theory of unenumerated parental rights underlying these three cases has small claim to *stare decisis* protection. A legal principle that can be thought to produce such diverse outcomes in the relatively simple case before us here is not a legal principle that has induced substantial reliance. While I would not now overrule those earlier cases (that has not been urged), neither would I extend the theory upon which they rested to this new context.[8]

Justice Souter observed in his concurrence in *Troxel*, "[o]ur 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."[9] The lack of exact boundaries pointed to by Justice Souter highlights the possibility that the fundamental parental right, as it now stands, is subject to shifting views, legal interpretations, and ideologies. Currently, there exists a fundamental parental right; however, it may be argued that the right and its exact parameters have not been solidified as firmly as they might be if the fundamental parental right were to become an enumerated right.

<u>Growing Concern</u>

There is growing concern among parental rights advocates that a weakening in the fundamental right of parents to raise their children is taking place. Part of this concern stems from a perceived

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[3] *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000).
[4] *Id.* at 65.
[5] *Id*. at 66.
[6] *Id*. at 65-66.
[7] *Id.* at 68-69.
[8] *Id.* at 92.*(Scalia dissenting).*
[9] *Id.* at 78. (Souter concurring).

ambiguity regarding the fundamental nature of parental rights in *Troxel*, and part of the concern is based on international attempts to create broad-based rights for children which may be in conflict with the societal and legal standards of parenting in the United States.

The Convention on the Rights of the Child, a product of the United Nations Committee on the Rights of the Child, is a legally binding treaty designed by its creators "to incorporate the full range of human rights—civil, cultural, economic, political and social rights." The Convention, created in 1989, sets out these rights in 54 articles and two Optional Protocols.[10] Critics believe the articles represent an infringement on the sovereignty of the United States. The United States is not a signatory to the Convention, but there is concern that without the establishment of enumerated, fundamental rights for parents in the Constitution, the established case law protecting those rights could eventually be superseded by international treaty.

The Constitution of the United States provides methods for the proposition and ratification of amendments.[11] The first method allows Congress to propose the amendment themselves, if there is two-thirds support for the amendment in both houses. The second method allows two-thirds of the states to call for a Convention for proposing amendments. Regardless of the method, any proposed amendments must be approved by three-fourths of the states in order to be ratified.

A. EFFECT OF CHANGES:

This memorial urges the United States Congress to propose and submit to the states for ratification an amendment to the United States Constitution enumerating a fundamental parental right.

Section 1 of the proposed amendment states that, "[t]he liberty of parents to direct the upbringing and education of their children is a fundamental right." This provision enumerates currently held parenting rights in the U.S. Constitution.

Section 2 of the proposed amendment provides that, "[n]either the United States nor any State shall infringe upon this right without demonstrating that its governmental interest as applied to the person is of the highest order and not otherwise served." This section prescribes a new standard of scrutiny that courts are to impose when determining whether a law infringing on a parental right is constitutional.
Currently, the highest level of scrutiny for protection of fundamental rights is the strict scrutiny standard, which requires that the law be narrowly tailored to serve a compelling state interest.[12]

Section 3 of the proposed amendment provides that, "[n]o treaty may be adopted nor shall any source of international law be employed to supersede, modify, interpret, or apply to the rights guaranteed by this article."

Copies of the memorial are to be provided to the President of the United States, the President of the United States Senate, the Speaker of the United States House of Representatives, and each member of the Florida delegation to the United States Congress.

The memorial includes "Whereas" clauses which note the traditional and fundamental nature of parental rights regarding the rearing of children without state interference as acknowledged in

[10] http://www2.ohchr.org/english/law/crc.htm
[11] Art. V, Section 4, U.S. Const.
[12] See, *J.B. v. Fla. Dep't of Children and Family Servs*., 768 So.2d 1060, 1064 (Fla.2000); *Kuvin v. City of Coral Gables*, 45 So.3d 859, (3d DCA 2010).

opinions of the United States Supreme Court, and emphasizing the need for parental rights to be enumerated in the Constitution.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: None

2. Expenditures: None

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: None

2. Expenditures: None

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR: None

D. FISCAL COMMENTS: None